

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 592

ALLEN CALCULATORS, INC., APPELLANT,

vs.

THE NATIONAL CASH REGISTER COMPANY AND
THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO

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[fol. 1]

**IN THE DISTRICT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF OHIO, WESTERN DIVI-
SION**

In Equity No. 6802

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

**THE NATIONAL CASH REGISTER COMPANY, JOHN H. PATTER-
SON, E. A. Deeds, G. C. Edgeter, W. F. Bippus, Robert
Patterson, J. A. Oswald, S. W. Davies, George G. Shaw,
E. H. Bunstine, H. G. Carnell, A. A. Thomas, Thomas
J. Watson, Joseph Rogers, Alexander Harned, F. S.
High, M. G. Keith, W. M. Cummings, J. C. Laird, Pliny
Eves, A. A. Wentz, George E. Morgan, C. T. Walmsley,
W. C. Howe, C. A. Snyder, Walter Cool, E. H. Epperson,
Myer N. Jacobs, and M. L. Lasley, Defendants**

FINAL DECREE—Filed February 1, 1916

This day come the parties, by their counsel, and thereupon the defendants hereinafter named, consenting not to oppose the entry of the following decree, as more fully appears by their written consent on file herein, and the plaintiff, through its counsel, having moved for an injunction, on consideration thereof the Court finds for the plaintiff and against said defendants, and that the plaintiff is entitled to the relief prayed for in the following particulars:

It is therefore Ordered, Adjudged and Decreed:

First. That the defendants, The National Cash Register Company, John H. Patterson, G. C. Edgeter, W. F. Bippus, Robert Patterson, George G. Shaw, H. G. Carnell, Alexander Harned, F. S. High, M. G. Keith, W. M. Cummings, [fol. 2] J. C. Laird, Pliny Eves, C. T. Walmsley, C. A. Snyder, E. H. Epperson, Myer N. Jacobs, and M. L. Lasley, have combined to restrain and have attempted to monopolize interstate and foreign trade and commerce in cash registers in violation of Sections 1 and 2 of the Anti-Trust Act of July 2, 1890, by one or another of the means hereinafter enjoined.

Second. That the defendant, The National Cash Register Company, its directors, officers, agents and employees, and

the individual defendants, John H. Patterson, G. C. Edgeter, W. F. Bippus, Robert Patterson, George G. Shaw, H. G. Carnell, Alexander Harned, F. S. High, M. G. Keith, W. M. Cummings, J. C. Laird, Pliny Eves, C. T. Walmsley, C. A. Snyder, E. H. Epperson, Myer N. Jacobs, and M. L. Lasley, their employees, agents, and servants, and any other persons authorized to act or acting for or in behalf of any of them be and they are hereby jointly and severally enjoined and restrained as follows:

- (a) From persuading or inducing, or attempting to persuade or induce, a purchaser of a cash register or other registering device manufactured or sold by any competitor, or a person who has agreed or contracted to become such purchaser, to break or repudiate his contract of purchase, or to return or refuse to receive the cash register or other registering device so bought or agreed to be bought, or to refuse to pay for the same in accordance with his agreement with said competitor.
- (b) From espionage upon a competitor or his agent, or a solicitor of a competitor, or upon a retail dealer in the cash registers or other registering devices of a competitor, for the purpose of obtaining the names or addresses of purchasers or prospective purchasers from any such competitor or retail dealer, or for the purpose of obtaining any other information as to his private affairs or business; and from using any information so obtained in order to dissuade or endeavor to dissuade any person or persons from purchasing any cash register or other registering device manufactured or sold by a competitor.
- (c) From inducing or attempting to induce, either directly or through another, any employee or ex-employee of any competitor, or of his agent, or dealer, to disclose to said defendants, or to either of them or to any person for them or for either of them the business secrets of his employer or former employer.
- (d) From inducing, or attempting to induce, any employee or agent of a competitor, or any dealer in the cash registers or registering devices of a competitor, to leave [fol. 3] the service of such competitor or to cease to deal in such competitor's cash registers or other registering devices, and from employing or attempting to employ any such agent or employee so induced to leave the service

of a competitor, or any such dealer so induced to cease dealing in the cash registers or other registering devices of a competitor, as an agent or employee of the defendant corporation or any company organized as a successor to its business in whole or in part.

(e) From using any information as to the trade secrets or business confidences of any competitor which shall have been derived from any person who shall have been in the employ of any such competitor and which shall have been obtained by him in the course or by means of such employment.

(f) From manufacturing, selling or offering for sale any cash register or other registering device made to resemble in appearance a competing register or registering device, or producing, or designed to produce, the same or similar results, or performing, or designed to perform, the same or similar functions, when sold or offered for sale, not in good faith for the purpose of earning profits therefrom, but for the dominant purpose of preventing sales of such competing cash registers or registering devices, or of inducing the purchaser or owner of the competing cash register or registering device to substitute therefor one of such similar machines; or from selling any cash register or registering device at a price fixed with reference not to the cost of manufacture but solely with reference to the price of the said competing cash register or registering device, for the purpose of driving from business in interstate or foreign commerce the manufacturer of or dealer in such competing cash registers or other registering devices.

(g) From selling or otherwise disposing of any cash register or other registering device manufactured by a competitor, whether acquired by purchase, exchange, or otherwise, not for the purpose of realizing therefrom as much as practicable but for the dominant purpose or intent of preventing sales by a competitor or retail dealer in the cash registers or registering devices of a competitor; and from acquiring any such cash register or other registering device, manufactured by any competitor, for any of the purposes specified in this subparagraph of this decree.

(h) From selling or otherwise disposing of any second-hand cash register or other registering device of the de-

fendant's own make for the purpose not of realizing therefrom as much as practicable but for the dominant purpose of underselling a competitor and driving him from business; [fol. 4] Provided, that nothing herein contained shall prevent any sale or offer at a price made in good faith to meet competition.

(i) From employing any person, whether known as a "special man", or "competition man", hereby defined to be an employee, to have as his principal business not the promotion of the sale of the cash registers or other registering devices of the make of the defendants, or the solicitation of orders therefor, but the prevention of sales of cash registers or other registering devices by a competitor, or his agent, or dealer.

(j) From following from one city or village to another, or from one place in the same city or village to another place therein, any competitor, or his salesman, or agent, or any dealer in a competitive cash register or other registering device, for the purpose of interfering with or hindering such competitor, salesman, agent, employee or dealer, while attempting to sell any cash register or other registering device, or for the purpose of ascertaining the names of the persons upon whom, or the places of business at which, such competitor, salesman, agent, employee, or dealer, may call.

(k) From making, or circulating, or causing to be made or circulated, any statement, report, representation, or insinuation reflecting upon the solvency or responsibility, financially or otherwise, of any competitor, or upon the efficiency of any competing cash register or other registering device, when such statement, report, representation, or insinuation is either a misrepresentation or is made for the mere purpose, not of directly promoting the sale of registers or other registering devices manufactured by defendants, but of preventing the sale of competing cash registers or other registering devices, or of driving such competitor from business.

(l) From using or publishing, or causing to be used or published, any document, circular, or letter, the purpose or intent of which is to recommend or suggest to agents or employees of the defendants the doing of any act herein forbidden; and from in any manner communicating to such

agents or employees any means of accomplishing or bringing about any such act.

(m) From intimidating, or attempting or threatening to intimidate any competitor or any person contemplating becoming a competitor in the manufacture or sale of cash registers or other registering devices in interstate or foreign commerce by maintaining or making a display of models of machines of the defendants' make, together with various rival machines which they were built to resemble [fol. 5] or to displace, or by maintaining or making a display of quantities of second-hand registers or other registering devices of a competitor, or by displaying placards or statements purporting to show the amounts lost by various competitors in an effort to compete with the defendant corporation, or its predecessors, and from intimidating, or attempting or threatening to intimidate, by any such means, investors or persons contemplating becoming investors in the stocks or other securities of competing companies formed or to be formed.

(n) From maintaining as an ostensible competitor any corporation or organization owned, directed or controlled, by stock ownership or otherwise, by said defendants or any of them or affiliated with them, or any of them without disclosing the connection with the said defendants.

(o) From intimidating, or attempting or threatening to intimidate purchasers or prospective purchasers of competing cash registers or other registering devices, with suit or liability for patent infringement unless and until such claim of infringement has been sustained by a court of competent jurisdiction. But nothing herein contained shall prevent defendant corporation or its proper representative from serving in good faith upon any such purchaser a formal notice of its claim of infringement.

(p) From acquiring ownership or control directly or indirectly, by means of stock ownership or otherwise, of the whole or an essential part of the business, patents, or plant of any competitor engaged in the manufacture or sale of cash registers or other registering devices in interstate or foreign commerce; Provided, that in case any such acquisition is desired, a petition may be presented to this Court stating the reasons therefor, and if the Court upon investigation into all the circumstances of the case and after notice of not less than sixty days to the Attorney

General shall determine that such business or patents or plant so desired to be acquired will supplement the plant, patents, machines, or facilities of the defendant corporation and that the acquisition thereof is desired for that purpose and will not substantially lessen competition, then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as may be right.

Third. That jurisdiction of this cause be and is hereby retained for the purpose of enforcing this decree, and for the purpose of enabling the parties to apply to the Court for modification hereof if it be hereafter shown to the satisfaction of the Court that by reason of changed conditions or changes in the statute law of the United States the provisions hereof have become inappropriate or inadequate to maintain competitive conditions in interstate or foreign [fol. 6] trade in cash registers or other registering devices in the United States, or have become unduly oppressive to the defendants and are no longer necessary to secure or maintain competitive conditions in such interstate and foreign trade.

Fourth. That defendants pay the costs of this suit to be taxed.

Fifth. That said petition be and it is hereby dismissed without prejudice as against the defendants S. W. Davies, E. H. Bunstine, A. A. Thomas and A. A. Wentz.

Hollister, Judge.

(February 1, 1916.)

[fol. 7] IN UNITED STATES DISTRICT COURT

In Equity. No. 6802

[Title omitted]

PETITION OF NATIONAL CASH REGISTER CO.—Filed Aug. 30,
1943

To The Honorable Judge of the District Court of the United States, Southern District of Ohio, Western Division:

The petition of The National Cash Register Company, a Maryland Corporation, respectfully shows and alleges as follows:

I. On February 1, 1916, there was entered in the above cause (in which The National Cash Register Company, an

Ohio Corporation, the predecessor in business of your petitioner, was one of the defendants), a final decree, which thereafter continuously has been, and now is, in full force and effect and applicable to your petitioner.

II. By Paragraph Second, subdivision (p) of said final decree, your petitioner, its directors, officers, agents and employees, are enjoined and restrained as follows:

"From acquiring ownership or control directly or indirectly, by means of stock ownership or otherwise, of the whole or an essential part of the business, patents, or plant of any competitor engaged in the manufacture or sale of cash registers or other registering devices in interstate or foreign commerce; *Provided*, that in case any such acquisition is desired, a petition may be presented to this Court stating the reasons therefor, and if the Court upon investigation into all the circumstances of the case and after notice of not less than sixty days to the Attorney General shall determine that such business or patents or plants so desired to be [fol. 8] acquired will supplement the plant, patents, machines or facilities of the defendant's corporation and that the acquisition thereof is desired for that purpose and will not substantially lessen competition, then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as may be right."

III. On information and belief, your petitioner represents that the Allen-Wales Adding Machine Corporation (hereinafter referred to as "Allen-Wales") is a corporation organized and existing under the laws of the State of New Jersey having an authorized capital stock consisting of 10,000 shares of common stock without par value, all of which are issued and outstanding, and 10,000 shares of preferred stock of a par value of \$100 each, of which 5,009 shares are issued and outstanding (including 9 shares held in the Treasury of the Corporation). The said corporation has been and now is chiefly engaged in the business of manufacturing and selling adding machines. To a very limited extent, it has also manufactured and sold commercial bookkeeping or accounting machines and combination adding and cash-drawer machines. The machines manufactured by the said corporation are sold in both interstate and foreign commerce.

IV. Your petitioner represents that it has heretofore entered into a contract (which will be exhibited to this Honorable Court) with certain stockholders of Allen-Wales, whereby it has agreed to purchase all or not less than 95% of the outstanding common stock and all or not less than 50% of the outstanding preferred stock of Allen-Wales, subject to the approval of this Honorable Court.

V. The petitioner represents that there is not now and that there never has been any substantial competition between your petitioner and Allen-Wales, for the following [fol. 9] reasons:

1. The business of your petitioner (other than the production of war materiel in which it is now engaged) consists of (a) the manufacture and sale of cash registers, (b) the manufacture and sale of accounting machines, and (c) the manufacture and sale of accessories and supplies for such machines and the servicing of such machines. The petitioner and its predecessors have been in the cash register business for more than sixty years and have been in the accounting machine business for about twenty-five years. During the year 1942, petitioner converted its plant to war work, in which it is now engaged. For the year 1941, its sales of cash registers represented 72.66% of its total business and its sales of accounting machines 27.34%. Petitioner has never manufactured or sold adding machines, as such, although adding and subtracting mechanism is contained in many of the machines manufactured by the petitioner.

2. On information and belief, more than 94% of the business of Allen-Wales (other than the production of war materiel, in which it is now engaged) has consisted in the manufacture and sale of adding machines, although it has manufactured and sold, in very small quantities, two models of a combination adding and cash-drawer machine, which perform some functions similar to those of cash registers but lack the essential features of cash registers and, as a result, have never been in direct or substantial competition with cash registers manufactured and sold by petitioner. Allen-Wales has also manufactured and sold, in small quantities, two models of commercial bookkeeping machines which are similar, in some of their operations, to certain of the accounting machines manufactured by the petitioner;

but these machines, being in a much lower price range, have [fol. 10] never been in direct competition with any of the accounting machines manufactured and sold by petitioner.

3. There is no competition between adding machines, as such, and either cash registers or accounting machines.

(a) An adding machine is a device for the mechanical totaling, by addition or subtraction, with or without printing, of a series of figures.

(b) A cash register is a tamper-proof mechanical device which, by visual indication and the automatic printing of a receipt and a locked-in tape, both showing the total amount or amounts of a retail transaction, forces an accurate accounting for cash received and paid out of a controlled cash drawer. It may also provide additional information through separate automatic totals, by types of merchandise, types of sales, and by clerk. The function of a cash register, although it contains adding mechanism and prints totals of columns of figures, is primarily to protect the retail merchant's money and to furnish information which will enable him to prepare records needed to operate his business efficiently.

(c) An accounting machine is a device by which entries and extended balances are mechanically printed in one or more bookkeeping columns, on one or more forms, with or without typewritten description, and by which totals for various classifications are automatically accumulated, all in simultaneous operation. Accounting machines are used extensively by banks, manufacturing companies, insurance companies, department stores, etc., in their accounting departments, for handling accounts receivable, accounts payable, [fol. 11] general ledgers, payroll and cost accounting.

(d) The same customers who purchase and use cash registers and accounting machines frequently purchase adding machines and make use of them in conjunction with or supplemental to the other machines, particularly accounting machines.

VI. The petitioner represents that the acquisition of the capital stock of Allen-Wales by your petitioner will not have the effect of lessening competition in any measure.

On the contrary, such acquisition will tend to increase competition in the field of adding machines. Allen-Wales is one of the smaller corporations engaged in that business; its principal competitors transacting a much larger volume of business and having greater financial resources and much larger and better equipped selling organizations. The principal competitors of Allen-Wales in the adding machine field are also the strongest competitors of petitioner in the accounting machine field, among them being the Burroughs Adding Machine Company, the Underwood-Elliott Fisher Company and the Remington Rand Company. Those three corporations do more than 62% of the adding machine business in the United States, and Allen-Wales does about 8%. Your petitioner, with financial and manufacturing resources and a selling organization much larger than those of Allen-Wales, will be able to increase the production and sale of its line of adding machines and compete on more even terms with the present competitors of Allen-Wales in the adding machine field.

VII. In acquiring the stock of Allen-Wales there will be no acquisition of patents or patent rights by your petitioner which will tend to lessen competition. The basic patents have all expired. Allen-Wales owns seven patents and [fol. 12] seven patent applications, each of which relates only to details of construction, and all of which could easily be avoided in the design of a new adding machine. There are no patents owned or controlled by Allen-Wales under which your petitioner would not be willing to grant non-exclusive licenses to others, free of royalties. Allen-Wales has a non-exclusive license from an independent inventor, William S. Gubelman, for the manufacture and sale of adding machines, under certain patents owned or controlled by him; but petitioner is advised that the principal competitors of Allen-Wales in the adding machine field, including the three corporations hereinbefore mentioned, have similar licenses from Mr. Gubelman; and your petitioner already has a similar non-exclusive license under the same Gubelman patents for all its present and future products. Your petitioner has been informed that Allen-Wales owns or has an interest in one patent and six patent applications relating to mercury switches, a feature not essential to the building of adding machines and one which your petitioner does not consider of importance in connec-

tion with any of its products. Accordingly, your petitioner has made an agreement with Mr. W. J. Pickering, now President of Allen-Wales, that if your petitioner acquires the stock of Allen-Wales it will cause to be assigned to him all right, title and interest of Allen-Wales in these applications and the patents resulting therefrom, and all subsequent patent applications filed by any employee of Allen-Wales or the petitioner relating to a mercury switch and/or governor, for a nominal consideration, subject to a non-exclusive license to your petitioner under such patents.

[fol. 13] VIII. Your petitioner represents that it desires to acquire the said stock of Allen-Wales for the following reasons:

- (a) To supplement the line of products of the petitioner, by adding thereto a line of adding machines, not now manufactured or sold by the petitioner. Other leading companies in the office equipment field make and sell both accounting machines and adding machines.
- (b) To enable the petitioner to so supplement its line of products promptly after the cessation of hostilities through the acquisition of the present line of adding machines of Allen-Wales and the drawings, designs and machinery of Allen-Wales used in the manufacture thereof, without the necessity of the petitioner itself undertaking to design a line of adding machines and design and manufacture tools and machinery for the manufacture thereof, which preparatory work cannot be started while the petitioner is engaged almost exclusively in the production of war materiel for the Government of the United States and which would require more than two years after the cessation of hostilities before production could be commenced.
- (c) Adding machines will be a new product in the petitioner's line of machines, and the addition of such new product will enable the petitioner, after the war, to utilize factory facilities developed in connection with its production of war materiel and will provide additional employment for men and women in the petitioner's factory in Dayton, Ohio, the number of whom has been greatly increased in carrying out petitioner's war program.
- (d) Petitioner will be enabled to obtain the services of employees of Allen-Wales trained in the production of adding machines.

[fol. 14] (e) Petitioner has been obliged to train and develop a sales force in its accounting machines division separate from its cash register sales force, because of inherent differences in these two lines of business and in the type of customers to be approached. The adding machine business is more closely allied to the accounting machine business (although not competitive with it) than is the cash register business; and the addition of a line of adding machines to its products will enable the petitioner to make increased use of its accounting machine sales force, reduce its sales education expense and thus reduce the cost of distributing its products. It will also enable the petitioner to obtain increased coverage of the market in the accounting and adding machine field and thus increase the effectiveness of its sales organization.

(f) By adding a line of adding machines to its products, the petitioner will be enabled to increase the usefulness of its service and repair department and improve the mechanical servicing of its products.

Wherefore, your petitioner prays: that the acquisition by your petitioner of all or not less than 95% of the common stock and all or not less than 50% of the preferred stock of Allen-Wales Adding Machine Corporation be permitted and approved, on the ground that such acquisition will supplement the plant, patents, machines and facilities of the petitioner, and that such acquisition is desired for that purpose and will not substantially lessen competition.

And your petitioner, as in duty bound, will ever pray, etc.

Respectfully submitted, The National Cash Register Company, by Ezra M. Kuhns, Secretary.

Joseph S. Graydon, Atty. for Petitioner, 1616 Union Trust Bldg., Cincinnati, Ohio.

[fol. 15] *Duly sworn to by Ezra M. Kuhns, jurat omitted in printing.*

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

In Equity No. 6802

NOTICE OF PETITION—Filed September 24, 1943

To the Honorable the Attorney General of the United States,
Washington, D. C.:

Notice is hereby given that on this 30th day of August, 1943, The National Cash Register Company, a Maryland corporation, filed in the District Court of the United States, Southern District of Ohio, Western Division, in the case of the United States of America, Plaintiff vs. The National Cash Register Company, et.al., Defendants, In Equity No. 6802, its petition praying for an Order of the Honorable Court, permitting the said Company to acquire all or not less than Ninety-five (95%) percent of the common stock and all or not less than Fifty (50%) percent of the preferred stock of the Allen-Wales Adding Machine Corporation, a New Jersey corporation.

The aforesaid notice grows out of the Second Paragraph, Subdivision (p) of the final Decree entered in the above entitled proceedings on February 1, 1916, by which not less than sixty days' notice to the Attorney General of applications herein referred to is required. A true and correct copy of said Petition under the Seal of the Clerk of the District Court of the United States, Southern District of Ohio, Western Division, is hereto annexed.

Joseph S. Graydon, Attorney for Petitioner.

August 30, 1943.

[fol. 17] Washington, D. C., September 2, 1943.

Receipt of the above notice with attached certified copy of Petition, filed August 30, 1943, is acknowledged.

_____, Attorney General, by Elliott H. Moyer,
Special Assistant to the Attorney General.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

In Equity No. 6802

ANSWER OF THE UNITED STATES TO THE PETITION OF THE NATIONAL CASH REGISTER COMPANY FOR AN ORDER PERMITTING THE ACQUISITION OF STOCK OF THE ALLEN WALES ADDING MACHINE CORPORATION—Filed November 11, 1943

To the Honorable Judge of the District Court of the United States, Southern District of Ohio, Western Division:

The United States of America, by Wendell Berge, Assistant Attorney General, acting under the direction of the Attorney General, in answer to the petition of the National Cash Register Company filed in this Court and cause on August 30, 1943, respectfully alleges upon information and belief as follows:

1. The manufacture and sale of cash drawer and bookkeeping machines by the Allen Wales Adding Machine Corporation is a recent development by that company, that 1940 was the first year in which serious effort was made by the Allen Wales Adding Machine Corporation to market these products, that there has been and, after the war emergency, will be a wide potential market for such products, that the cash register and bookkeeping products of the National [fol. 19] Cash Register Company and the bookkeeping and cash drawer products of the Allen Wales Adding Machine Corporation have been and, after the war emergency, will be in direct and substantial competition, particularly in connection with sales to small business units and sales of low price bookkeeping and cash drawer machine lines. The public would be injured by the elimination of the Allen Wales cash drawer and bookkeeping machine line or by control over such Allen Wales products being vested in the National Cash Register Company, which has established products of its own in these fields.

2. The National Cash Register Company has planned to manufacture and sell adding machines and will manufacture and sell adding machines as soon as its production schedules and research facilities permit such manufacture and sale, even though the National Cash Register Company does not

acquire control over the Allen Wales Adding Machine Corporation. The potential competition in adding machines between the National Cash Register Company and the Allen Wales Adding Machine Corporation should be maintained. The elimination of such competition would be contrary to the letter and spirit of the Sherman Act (26 Stat. 209, as amended) and the Clayton Act (38 Stat. 730, as amended).

3. The acquisition by the National Cash Register Company of control over the Allen-Wales Adding Machine Corporation would eliminate and substantially decrease competition in the distribution and servicing of both new and used adding machines, bookkeeping and accounting machines, cash drawer machines and business machines generally. The National Cash Register Company and each of the principal manufacturers of business machines control or operate their [fol. 20] own system of distribution for their own products and maintain complete control and discretion over prices, terms of sale, trade-in allowances, cost of servicing and repairs, distribution and cost of parts and all other activities related to distribution and require that practically all persons engaged in the distribution of their products sell only one such manufacturer's products exclusively. The Allen-Wales Adding Machine Corporation distributes its products through approximately 250 independent business machine and office equipment dealers who do and may make their own determinations with respect to trade-in allowances, valuations and terms of sale for second-hand machines, prices for repairs, parts and services and other matters related to the distribution, servicing, and handling of business machines. The continued independent existence of the Allen Wales Adding Machine Corporation as a source of supply for independent dealers is essential to the maintenance of substantial competition in the distribution of adding machines, bookkeeping machines and other business machines both with respect to the products of the National Cash Register Company and the products of other manufacturers of business machines. Substantially 65 to 70 per cent of the sales of adding machines are made through distribution systems owned, controlled or operated by the major manufacturers of business machines and approximately one-third of the remaining production of adding machines which is all that is available for distribution by independent distributors of office equipment and business machines is produced by the

Allen Wales Adding Machine Corporation. The continued availability of Allen Wales products and parts to independent distributors is necessary for their continued existence and for the availability to them of a balanced and adequate line of business machines and of products and parts of established consumer acceptance. The continued existence of such independent distributors is necessary not only to maintain vigorous competition in the distribution [fol. 21] of adding machines, but to maintain outlets for new or expanding manufacturers of business machines who would be hindered in entering into, continuing, or expanding the production of business machines without the availability of independently operated distribution outlets.

4. The acquisition of control by the National Cash Register Company of the manufacture and sale of Allen Wales cash drawer machines, accounting machines and adding machines would have the same effects of eliminating competition and prospective competition as the practices charged under the heading "Preventing Prospective Competition" and "The Acquisition of the Business of Competing Companies," in the petition filed in this Court and cause on December 4, 1911, and would not be consistent with the purpose of the final decree entered in this Court and cause on February 1, 1916.

Wherefore, the United States respectfully requests that such petition be denied.

United States of America. By (S.) Wendell Berge,
Assistant Attorney General. (S.) Ernest S. Meyers, (S.) Elliott H. Moyer, Special Assistants to the Attorney General.

[fols. 22-22a] IN UNITED STATES DISTRICT COURT

(Title Omitted)

In Equity No. 6802

ORDER OVERRULING MOTION FOR LEAVE TO INTERVENE—Filed November 16, 1943

This cause came on to be heard at the opening of the proceedings on November 15, 1943, on the motion of Allen Calculators, Inc. for leave to intervene and to file an answer

attached to said motion, copies of which motion and answer had been served on the United States Attorney General and the attorney for National Cash Register Company, and such motion was argued by counsel for the United States, The National Cash Register Company and movant, on consideration whereof the court overrules said motion; to which ruling Allen Calculators, Inc. excepts.

Chauncey B. Garver, Joseph S. Graydon, Attys for Nat'l Cash Register Co.; Elliott H. Moyer, Special Assistant to Attorney General; M. Seasongood, Frank R. Bruce, for Allen Calculators, Inc.

Druffel, J.

[fol. 23] IN DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

In Equity No. 6802

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE NATIONAL CASH REGISTER COMPANY, et al., Defendants

FINDINGS AND ORDER—Filed December 7, 1943.

Pursuant to the requirements of paragraph Second, subdivision (p) of the decree entered in this Court and cause on February 1, 1916, this cause came on to be heard upon the petition of the National Cash Register Company, a Maryland corporation, successor in business to the National Cash Register Company, an Ohio corporation, defendant in this cause, filed herein on the 30th day of August, 1943, said petition praying for authority for the National Cash Register Company, a Maryland corporation, to purchase all or not less than 95% of the outstanding common stock, and all or not less than 50% of the outstanding preferred stock of the Allen-Wales Adding Machine Corporation, a New Jersey Corporation, pursuant to a certain contract which the petitioner had entered into with certain stockholders of the Allen Wales Adding Machine Corporation, subject to the approval thereof by this Court. After con-

sideration of said petition, the answer thereto, the evidence, and arguments of counsel, the Court finds:

1. More than 94% of the business of the Allen-Wales Adding Machine Corporation (other than the production of war materiel) has consisted of the manufacture and sale of adding machines, and the Allen-Wales Adding Machine Corporation does approximately 8% of the adding machine business in the United States.

[fol. 24] 2. The petitioner, the National Cash Register Company, except for an insignificant number of its Class 3000 accounting machines which were converted to function as adding machines, has not engaged in the manufacture or sale of adding machines while its principal competitors in the production and sale of cash registers and accounting machines are engaged in the manufacture and sale of adding machines.

3. In 1941 the Allen-Wales Adding Machine Corporation manufactured and sold 257 commercial bookkeeping machines and such sales constituted 3-7/10% of the total dollar volume of the Allen-Wales Adding Machine Corporation.

4. In 1941 Allen-Wales Adding Machine Corporation manufactured and sold 327 units of its combination adding and cash drawer machine and such sales constituted approximately 2-1/10% of its dollar volume.

5. The competition between the accounting machines and cash registers of the National Cash Register Company and the accounting machines and combination adding and cash drawer machines of the Allen-Wales Adding Machine Corporation is not substantial.

6. The business machines manufactured by the National Cash Register Company are sold and distributed through its employees, operating under rules, regulations, and instructions promulgated by the National Cash Register Company.

7. The business machines produced by the Allen-Wales Adding Machine Corporation are sold and distributed extensively through distributors who own and operate their own sales agencies, and through independent dealers who operate their own businesses, in the course of which they to a substantial degree make their own determinations as

to the policies and practices to be followed in the sale and distribution of business machines. The preservation of such distributors and independent dealers as competitors in the field of distribution of business machines is a matter of public interest.

[fol. 25] 8. The acquisition by the petitioner of the assets and business of the Allen-Wales Adding Machine Corporation through the purchase from certain stockholders thereof of all or part of its outstanding common stock and all or part of its outstanding preferred stock will supplement the plants, machines, and facilities of the petitioner; and such acquisition is desired by the petitioner for the purpose of supplementing its plants, machines, and facilities, and, upon compliance with the conditions set forth in said Section 9 hereof, such acquisition will not substantially lessen competition.

9. It is therefore ordered, adjudged, and decreed that the petitioner, the National Cash Register Company, a Maryland corporation, be, and it is hereby, authorized and permitted to acquire the assets and business of the said The Allen-Wales Adding Machine Corporation, a New Jersey corporation, through the purchase of all or part of its outstanding common stock and all or part of its outstanding preferred stock: Provided, however, that such acquisition shall bind the National Cash Register Company to the performance of the following conditions:

A. The operations of Allen-Wales Adding Machine Corporation shall be maintained as a separate division of the National Cash Register Company, or as a separate corporation, with a complete and independent accounting system until at least January 1, 1950.

B. All existing contracts between the Allen-Wales Adding Machine Corporation and dealers and distributors of its products shall be continued in full force and effect by National Cash Register Company at least until January 1, 1950; provided that any such contract may be terminated prior to January 1, 1950: (1) with the consent of the dealer or distributor who is a party thereto, or (2) in good faith and for good cause based on substantial breach of such contract by such dealer or distributor. No termination for cause of such

[fol. 26]

an existing contract shall be effective until the dealer or distributor involved has been given at least 30 days' notice of intention to terminate his distributorship or dealership contract, and each such notice shall include a statement of the cause relied upon for such termination.

Any such contract may be modified prior to January 1, 1950, with the consent of the dealer or distributor involved, provided, however, that any such contract may be modified or terminated prior to January 1, 1950, without the consent of the dealer or distributor involved if permitted by the terms thereof but only to the extent necessary to permit petitioner, through its regularly established agencies and representatives, to solicit sales, sell and service products of The Allen-Wales Adding Machine Corporation in territory now covered by any such contract without any obligation to pay to or share commissions or discounts with any such dealer or distributor resulting from any such soliciting, selling or servicing; and provided further that, upon any such termination, the dealer or distributor involved therein shall be offered a new contract identical with his existing contract except for the elimination therefrom of any exclusive or preferred rights in the territory covered thereby, as against such soliciting, selling and servicing by regularly established agencies and representatives of the petitioner, and such new contracts shall be subject to the provisions of this Order. Nothing in this Order shall be deemed to prejudice any right which any dealer or distributor has under any existing contract.

C. Parts for repairing or servicing the products of the Allen-Wales Adding Machine Corporation shall be [fol. 27] made available by the petitioner to the dealers and distributors of products of the Allen-Wales Adding Machine Corporation at least until January 1, 1954, for purchase or handling by such dealers and distributors.

D. The affairs of the Allen-Wales Adding Machine Corporation or the Allen-Wales Division of the National Cash Register Company, as the case may be, shall, during the periods that the provisions of this Order are operative, be conducted so as to exercise the utmost good faith in dealing with and in making im-

provements and servicing information available to existing dealers and distributors of Allen-Wales products and in making Allen-Wales products, accessories, and parts available to such dealers and distributors.

E. The purpose and intent of these conditions is to assure to existing dealers and distributors of products, including adding machines, bookkeeping machines, and cash drawer machines and accessories therefor, manufactured by the Allen-Wales Adding Machine Corporation that such products will remain available to them for approximately a five-year period after the resumption of substantially normal production of business machines; and, in the event that such resumption does not occur prior to January 1, 1945, the United States of America may petition this Court for an extension of the date specified in subsections A and B above. In the event any such extension is granted, a corresponding extension shall be made in the date provided in subsection C above.

F. No unfair or unreasonable discrimination shall be practiced against the dealers and distributors of the Allen-Wales Adding Machine Corporation in connection with the prices, terms, conditions, and procedures upon which Allen-Wales products, parts, accessories, and servicing information are, pursuant to this Order, [fol. 28] made available to its existing dealers and distributors, and such prices, terms, conditions, and procedures shall not, directly or indirectly, unfairly or unreasonably discriminate against such dealers and distributors.

10. Jurisdiction over the matters contained in the petition and over the provisions and conditions of this Order is hereby retained for the purpose of enabling the Attorney General or the petitioner to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Order, for the modification thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof. Jurisdiction is also retained for the purpose of enabling any dealer or distributor of the Allen-Wales Adding Machine Corporation to apply to this Court

for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Order, or for the enforcement of compliance therewith, in relation to any matter in which such dealer or distributor has an interest.

11. For the purpose of securing compliance with this Order, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or an Assistant Attorney General, be permitted (1) access during the office hours of the petitioner, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the petitioner, relating to any matters contained in this Order; (2) without restraint or interference from the petitioner, to interview officers or employees of the petitioner, or of the Allen-Wales Adding Machine Corporation, who may have counsel present, regarding any such matters; and (3) the petitioner, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this Order, provided, however, that information obtained [fol. 29] by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, or in connection with securing compliance with this Order.

12. The terms and conditions of the final decree entered in this Court and cause on February 1, 1916, shall remain in full force and effect.

13. This order shall not be deemed to determine or adjudicate the validity of any patent owned by the petitioner or the Allen-Wales Adding Machine Corporation nor the legality or validity of any patent license agreement or arrangement to which the petitioner or the Allen-Wales Adding Machine Corporation may be a party.

14. The costs of this proceeding shall be taxed to the petitioner.

John H. Druffel, United States District Judge.

Approved as to form: Graydon, Head & Ritchey, Attorneys for Petitioner; Wendell Berge, Assistant to the Attorney General; Ernest S. Meyers, Elliott H. Moyer, Special Assistants to the Attorney General.

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

In Equity No. 6802

PETITION FOR APPEAL—Filed December 4, 1943

Allen Calculators, Inc., a corporation duly organized and existing under the laws of the State of New York, states that on November 16, 1943, its motion for leave to intervene herein and to file an answer was denied by order of this Court. Allen Calculators, Inc., conceiving itself aggrieved by the ruling of the Court in denying said motion for leave to intervene, hereby appeals from said order to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

The Petitioner presents to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause.

Murray Seasongood, Frank R. Bruce, Attorneys for Petitioner.

Paxton & Seasongood, Scribner & Miller, of Counsel.

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

In Equity No. 6802

ASSIGNMENT OF ERRORS—Filed December 4, 1943

Allen Calculators, Inc., having filed its petition for appeal herein, now states that as a result of the action taken on November 16, 1943, by this Court in denying Allen Calculators, Inc., leave to intervene in this cause, there is manifest error in said cause to the prejudice of Allen Calculators, Inc., in the following respects:

1. The Court committed material error against Allen Calculators, Inc., in overruling the motion of Allen Calculators, Inc., to intervene in the above entitled cause.

2. The Court committed material error against Allen Calculators, Inc., in withdrawing leave to Allen Calculators, Inc., to intervene conditionally, which leave the Court had theretofore granted.

3. The Court committed material error against Allen Calculators, Inc., in failing to enter an order or decree in conformity with its decision in refusing leave to intervene.

Wherefore, petitioner prays that said order denying it leave to intervene be reversed and set aside.

Murray Seasongood, Frank R. Bruce, Attorneys for Petitioner.

Paxton & Seasongood, Scribner & Miller, of Counsel.

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

In Equity No. 6802

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed December 10, 1943

This cause having come on this day before the Court on petition of Allen Calculators, Inc., filed with the Clerk of this Court December 4, 1943, praying for the allowance of an appeal to the Supreme Court of the United States from the order entered herein November 16, 1943, denying intervention to Allen Calculators, Inc., and requesting that a duly authenticated copy of the record of this cause be transmitted to the Supreme Court of the United States; and on the assignment of errors and jurisdictional statement showing the jurisdiction of the Supreme Court to entertain the appeal sought, similarly filed on December 4, 1943, with said petition for appeal; and on the supplemental jurisdictional statement similarly filed this date; the Court having heard and considered the same,—

It Is, Therefore, Ordered And Adjudged that Allen Calculators, Inc. be, and it is, hereby allowed an appeal to the Supreme Court of the United States from the order of this Court denying Allen Calculators, Inc. leave to intervene, that a duly authenticated copy of the record in this cause be transmitted to the Clerk of the Supreme Court, and that a citation be issued as provided by law.

It Is Further Ordered that petitioner give bond for costs on such appeal as required by law in the sum of \$1000.00.

[fol. 33] It Is Further Ordered that Allen Calculators, Inc., be, and it is hereby allowed a period of forty (40) days from the date hereof within which to file and docket said appeal in the Supreme Court of the United States. Nothing in this order contained shall be deemed or construed to stay or supersede in any way the Findings and Order entered herein on the 7th day of December, 1943. To all of which The National Cash Register Company, excepts.

Dated at Cincinnati, Ohio, this 10th day of December, 1943.

(S.) John H. Druffel, United States District Judge.

Have seen Graydon, Head & Ritchey, Attys for The National Cash Register Company; M. Seasongood, for Appellant.

Have seen J. P. O'Malley, Dept of Justice.

[fols. 34-35] Bond on appeal for \$1,000.00 approved and filed Dec. 10, 1943, omitted in printing.

[fols. 36-38] Citation in usual form showing service on appellees omitted in printing.

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

In Equity No. 6802

PRAE~~C~~PIPE FOR APPEAL OF ALLEN CALCULATORS, INC.—Filed December 14, 1943

To the Clerk:

Please make transcript for appeal of Allen Calculators, Inc. from order refusing it leave to intervene by including the following:

1. Copy of decree of February 1, 1916.
2. Petition of National Cash Register Company, accompanying notice of August 30, 1943, to the Attorney General of the United States and receipt of same by Special Assistant to the Attorney General dated September 2, 1943.

3. Answer of the United States filed November 11, 1943.
4. Stipulation in connection with trial between The National Cash Register Company and the United States.
5. Findings and order entered December 7, 1943.
6. Letter of Wendell Berge, Assistant Attorney General, to various Allen-Wales dealers referred to in IV of stipulation (4 above) and 3 sample replies.
7. Portions of official stenographer's transcript of proceedings relating to proposed intervention and entry of refusal of leave to intervene.
8. Notice by Allen Calculators, Inc. of motion to intervene.
9. Proposed intervening answer of Allen Calculators, Inc. dated November 15, 1943.
- [fol. 40] 10. Proposed entry permitting intervention.
11. Proposed entry containing ground of refusal of leave to intervene.
12. Entry of November 16, 1943, refusing permission to intervene.
13. Portion of transcript containing statement of Special Assistant to the Attorney General in argument to the effect "United States not in adversary position."
14. Petition for appeal.
15. Assignment of errors.
16. Jurisdictional statement.
17. Supplemental jurisdictional statement.
18. Order allowing appeal.
19. Bond on appeal and approval of same by judge (omitting power of attorney attached to original bond).
20. Citation.
21. Acknowledgment of service of citation by counsel for The National Cash Register Company and the United States of America.
22. Notice pursuant to Rule 12, par. 2, Rules of United States Supreme Court and acknowledgment of service of copies.

23. Proof of service of this praecipe (Rule 10, par. 2) and copies required to be served.

Murray Seasongood, Frank R. Bruce, Attorneys for Appellant, Allen Calculators, Inc.

Service of copy of above praecipe acknowledged this 14th day of December, 1943.

Graydon, Head & Ritchey, Attorneys for The National Cash Register Company.

J. R. O'Malley, Department of Justice.

[fol. 41] IN UNITED STATES DISTRICT COURT

In Equity No. 6802

[Title omitted]

SUPPLEMENTAL PRAECIPE OF THE NATIONAL CASH REGISTER COMPANY—Filed December 23, 1943

To the Clerk:

On behalf of The National Cash Register Company, please make supplemental transcript in connection with the appeal of Allen Calculators, Incorporated, by including the following:

1. Motion to Dismiss or Affirm by Appellee, The National Cash Register Company.
2. Statement on behalf of Appellee, The National Cash Register Company, Opposing Jurisdiction.
3. Proof of Service by The National Cash Register Company.
4. Portion of transcript of testimony containing opening statement of Mr. Joseph S. Graydon and Mr. Elliott H. Moyer (beginning at the 5th line on page 3 of the transcript and ending at the end of the 15th line on page 15 thereof).
5. Statement of Mr. Joseph S. Graydon regarding the theory of the United States (beginning at the third last line on page 22 of said transcript and ending at the end of the 18th line on page 23 thereof).

6. Transcript of testimony of R. C. Allen (beginning at the 15th line on page 102 and ending at the end of the 14th line on page 116, thereof).

7. Portion of transcript of testimony containing closing statement of Mr. Elliott H. Moyer (beginning at the 7th line on page 135 and ending at the end of the 23rd line on page 161 thereof).

(S.) Joseph S. Graydon, (S.) Chauncey B. Garver,
Attorneys for The National Cash Register Company.

Service of copy of above Supplemental Praeclipe acknowledged this 23 day of December 1943.

(S.) Murray Seasongood, (S.) Frank R. Brice,
Attorneys for Allen Calculators, Inc. (S.) Calvin
Crawford, U. S. Attorney, Southern District of
Ohio, Western Division.

[fol. 42] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

In Equity No. 6802

THE UNITED STATES OF AMERICA, Plaintiff,

v.

THE NATIONAL CASH REGISTER COMPANY, et al., Defendants

EXCERPTS FROM STATEMENT OF EVIDENCE—Filed December
16, 1943

Before Honorable John H. Druffel, District Judge, at Cincinnati, Ohio, on November 15 and 16, 1943

Appearances:

For the Government: Elliott H. Moyer and Ernest S. Meyers, Special Assistants to the Attorney General, Department of Justice, Washington, D. C.

For the Defendant: Joseph S. Graydon and H. McD. Ritchey, of Graydon, Head & Ritchey, Cincinnati, Ohio.

Chauncey B. Garver, of Shearman & Sterling, New York,
N. Y.

For Proposed Intervenor, Allen Calculators, Inc.: Frank
R. Bruce, of Scribner & Miller, New York, N. Y. Murray
Seasongood, of Paxton & Seasongood, Cincinnati, Ohio.

[fol. 43]

Morning Session

Monday, November 15, 1943.

COLLOQUY BETWEEN COURT AND COUNSEL

Court met pursuant to adjournment. This cause coming
on to be heard, and counsel being present as heretofore
noted, the hearing proceeded as follows:

The Court: Does this take the original title of United
States of America against National Cash Register Com-
pany?

Mr. Graydon: Yes.

The Court: All right.

Mr. Graydon: Your Honor, I would like to introduce Mr.
Chauncey B. Garver, of Shearman & Sterling, of New York,
of counsel for the National Cash Register Company; and
Mr. Ernest Meyers and Mr. Elliott Moyer, of the Depart-
ment of Justice.

Mr. Seasongood: May I introduce Mr. Frank R. Bruce,
of the New York bar, of Scribner & Miller, attorney for
Allen Calculators, Incorporated?

The Court: What is the name of your client?

Mr. Seasongood: Allen Calculators, Incorporated; and
we have, your Honor, answer and application to intervene
which we would like to file. We have given copies to both
the Cash Register and the Government.

Mr. Graydon: We very strongly object. This is a suit
between the United States and the National Cash Register
Company. We have just seen this answer. There isn't any-
thing that the United States can't raise and isn't prepared
to raise, but we don't see where this company has any
standing as a party to this suit.

Mr. Meyers: Your Honor, the Government has no objec-
tion to the Allen Calculators Company's application to in-
tervene in this, because we feel that the federal rule is spe-
[fol. 44] cifically Rule 24(b)(2), which supports an appli-
cation to intervene at this time.

The Court: It is at least accepted conditionally at this time, to save time.

Mr. Graydon: All right.

Mr. Seasongood: We have an order permitting it to be filed.

The Court: Conditionally filed at this time.

Mr. Graydon: Note objection and exception of The National Cash Register Company.

The Court: May I see what it is all about?

Mr. Seasongood (Handing a paper to the Court): I can tell your Honor very briefly.

The Court: I will tell you—what I think we should do is to have a tentative opening statement from counsel representing each side, and then you will have your turn. At this time I think a brief statement of what this is about, for the record, will be sufficient, and then I suppose when all the evidence is in counsel want to submit argument by way of brief. Is that agreeable?

Mr. Graydon: Yes, I think so.

Mr. Garver: Yes, your Honor.

Mr. Seasongood: Unless your Honor would hear oral argument also.

The Court: We set these two days aside for this case because of the lawyers from out of town. We have a jury case Wednesday. No doubt we will have no time for extended argument, and briefs will suffice. Let's start, then.

Mr. Graydon: * * * That is our case, if your Honor please. I haven't undertaken to try to state what the Government's case is. I think they can state it themselves. I have read it but I don't know that I understand it.

[fol. 45] The Court: Is the Government ready to make a statement at this time? Of course, you understand the limit. We just want your position at this time.

Mr. Moyer: May it please the Court, the position of the Government on the application of The National Cash Register Company is this: * * *

Mr. Seasongood: Your Honor, we represent Allen Calculators, whom your Honor has conditionally or tentatively allowed to intervene. They are an independent dealer, and it is thought that the position of the independent dealer can be well presented by them, and by Mr. Allen in particular. I may say they very much fear this acquisition will be destructive of Allen Calculators, if National Cash is allowed

to buy Allen-Wales that there will be a destruction of the business of Allen Calculators. I call your Honor's attention to sub-paragraph (p) of the decree, and particularly that the ~~NCR~~—or the Cash, for short—is forbidden to acquire the stock ownership, which is what they purpose doing, of any competitor engaged in the business of cash registers or other registering device. I don't think my friend mentioned those words.

Mr. Graydon: I did. I read the whole thing.

Mr. Seasongood: It escaped my attention, at least it wasn't emphasized. The word was always "cash registers." Anyway, Allen-Wales does manufacture a cash register and is in direct competition now with the National Cash Register Company. Our friends can call it a cash drawer or something else, but it is a "cash register or other registering device" because a cash register is something that registers cash.

The Court: We will not go into that Boston decree at this point, but he has emphasized eight points defining a register, and this has three.

Mr. Seasongood: It has the cash registering, your Honor, [fol. 46] which is the essential element of it. That is a cash register (indicating). Of course, he has taken the cash register off of the Allen-Wales, but ordinarily it is superimposed. I think it is a complete cash register, but it does not have some of the features the National has, namely, it doesn't have the indicator and doesn't have a receipt to the customer, but it does register the cash and, therefore, it is a cash register. They are asking to be allowed relief from this decree. They were found guilty and forbidden to do these things.

Mr. Graydon: We consented to a decree.

The Court: We are not ready for argument.

Mr. Seasongood: The decree speaks for itself.

Mr. Graydon: We were not found guilty.

Mr. Seasongood: We will cite a case in the Supreme Court of the United States where the identical thing was and they were found guilty and enjoined from doing these acts. That is the first point. The first point is that they are only to have relief if there is no substantial diminution of competition as the result of the purchase and if the plant desired will supplement the plant—I call your Honor's attention to that—of the defendant corporation.

Now, to the extent that Allen-Wales is engaged in the manufacture of accounting machines—as they say, book-keeping machines, the acquisition will not supplement the cash register because they already have full equipments and arrangements and are making these very accounting machines; therefore, under the terms of the decree this is not permissible, as it is not required to supplement the plant. And this is a purchase of stock and all the business goes with it—that is down towards the end of sub-paragraph (p), about six lines before the end of it, that it must supplement, and to the extent that the Cash has already these accounting machines it is not a supplement to their [fol. 47] plant to acquire other accounting machines, which goes with the purchase of the stock of the Allen-Wales.

Now, another thing, the method of doing business of the Allen-Wales is the same as the method of doing business of the Allen Calculators. Substantially their method of doing business is identical. They are in competition, and their business is done, your Honor, through the medium of dealers, that is, it is like automobiles, and the general method of dealer handling is familiar, of course, to your Honor. That is, Allen Calculators sells to its dealers on favorable terms, the products are theirs, and they sell them with their other merchandise. The business of Cash is based on the agent system. The Cash Register Company continues to own the cash register, takes security on it, and the dealer for the cash register is merely an agent of the Cash Register Company. The two businesses, or methods of business, are very different.

The Court: Would you tell me now while you are here just your theory of why you have a right to intervene here? It appears a little unusual. This is kind of a semi-government proceeding in which the Government, on behalf of everybody, is opposing the confirmation of this sale. I would like to know just your position, how you expect the right to intervene, because we are going to have to pass on that; that is going to be one of the first things we are going to have to pass on.

Mr. Seasongood: I think an intervention is proper where parties in interest would be affected by the decree, and in this case the Allen Calculators is an independent dealer having particular knowledge of the effect that this transaction would have upon the lessening of competition and the lessening of the interference with its own business. It

has especial aptitude for presenting the position of the independent dealer in this field. It represents one of the independent dealers, as has been said, and the Government has no objection at all, as has been stated, to the intervention. [fol. 48] So it is in subordination to the government position. But the Government I think feels, and we certainly feel that, being in the field and having an opportunity to know the thing well, that its position should be represented. That was allowed in the Swift case, if your Honor please.

The Court: Who were the parties in the Swift case?

Mr. Seasongood: The Government and the Swift Packing Company, and the Grocers' Association was permitted to intervene in the case.

The Court: Just a thought, you know. There are occasions when you have a right to intervene and file a brief, but here is a proceeding between two private parties and you are a competitor and of course you may not like it, but what I wanted to do is to get your views and then between tonight and tomorrow to have any authorities to support your position. Do you have any objection to the case proceeding today between the Government and The National Cash Register Company and you just sit by and then—

Mr. Seasongood: —I think this, your Honor—of course, we want to cross-examine, have the opportunity to cross-examine.

The Court: I will tell you—you see, you can advise with the Government and assist them in bringing out any points that you think will be helpful, but it just seems a little unusual in a matter between two private parties here, in which the Government intervenes, that you come in. I thought if you had some authorities—

Mr. Seasongood: —Of course, we will supply the authorities, but that is true of any intervention. Intervention is always where somebody who is not a party to the original suit asks to come in and is permitted to come in because [fol. 49] he has a special interest. We think we have a special interest, and it does seem to me that where the Government, who is the moving party, has no objection, that the person who is proceeded against is not the one to say whether they should be permitted to intervene if the Government has no objection, and they said they didn't.

Mr. Meyers: Will the Court hear me a few minutes?

The Court: I didn't mean to interrupt.

Mr. Seasongood: I had about finished. The only other observation I was going to make, your Honor, is, as I said before, the method of doing business. The National Cash Register Company does business under the agency system, and these two concerns do business under the dealer system, and it is thought the method of doing business under the agency system will destroy the dealer system of this intervenor.

The Court: All right. We will hear from the Government.

Mr. Meyers: Your Honor, I merely wanted to comment on the application for intervention, if you will hear me on it.

The Court: All right. It seems to me this is unusual.

Mr. Meyers: I think the unusual character of this application is due to the fact that this is a decree matter and not a case of first impression. However, under the rules of civil procedure it seems clear to me that the application should be granted where the applicant for intervention has a claim or defense in common, providing that certain procedural aspects of the application are taken care of, such as time, and that the intervention will not unduly prejudice or delay the rights of the parties involved. I think the applicant [fol. 50] in this case meets the two conditions. I think it meets the substantive condition. That is, the applicant having a claim or defense in common with that of the Government, I think it is to the interest of the applicant that he preserve whatever rights he may have in this litigation because of two situations: (1) There is a matter of private litigation going on between Allen-Wales and Allen Calculators. In that the Government has no interest, but I can see the applicant would like to preserve whatever rights he has in that litigation in this action. (2) He has a claim, in my judgment, in common with the Government, to see that the retail level of distribution is not wiped out, diminished, by the petitioner in this cause, because such elimination of competition at the retail level, in the Government's opinion, would eliminate competition on the manufacturing level. That is the last vestige of competition that is remaining among independent manufacturers. So we do believe that the applicant here has a meritorious application to present to the Court, if the Court wants it.

The Court: Does the Government concede that Allen-Wales is one of nine manufacturers manufacturing the same type of machine and, assuming that eventually, if the deal went through, it would be approved by the upper courts, wouldn't there be eight doing the same line of business?

Mr. Meyers: I would like to defer to my associate on that. He has the figures.

The Court: I just want to know whether that is the fact.

Mr. Seasongood: We deny that.

The Court: That is all I want to know.

Mr. Garver: If your Honor please, may I hand up a stipulation which we are filing with the approval of the Government?

Mr. Seasongood: We would like to see that.

[fol. 51] Mr. Meyers: It admits certain allegations in the petition that we have agreed to.

Mr. Seasongood: Your Honor, we haven't had an opportunity to study this at all.

The Court: Of course, as I say here, you are in here co-operating with the Government. The Government has stipulated and for the sake of saving time we will be recessing in ten or fifteen minutes and you can see it.

Mr. Garver: Your Honor, that is why we object to this intervention.

The Court: We will go along. I think you have stated your position relative to the intervention.

Mr. Seasongood: Of course, our rights will be preserved as to everything that is offered that they have stipulated.

The Court: Without opening your mouth you have an exception to everything that takes place here.

The stipulation so offered is made part of this record, marked *Petitioner's Exhibit No. 1*.

Mr. Seasongood: Your Honor, may I make just one more suggestion as to our right to intervene?

Mr. Graydon: I don't think we want to hear this.

Mr. Seasongood: I think this would convince the Court—at least, I hope it would.

The Court: Is it going to take just a minute?

Mr. Seasongood: Just a minute, your Honor. Section 16 of the Clayton Act expressly authorizes any corporation to have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss

or damage by a violation of the anti-trust laws. If we would sue to enjoin this going through, the United States would have to intervene and we would have this all over again in another litigation, and it seems to me that makes [fol. 52] it clear we have the right to intervene.

Mr. Graydon: That may be clear, but the question is, who is running this case? Is this the Government's case or your case?

Mr. Seasongood: Any intervention has to be in subordination to the main person.

Mr. Graydon: If you think it is sufficiently subordinated, that is all right.

The Court: This is a proceeding to permit the purchase of this company by modification of the decree of this Court. We must not lose sight of that. I think later along we can consider the matter of intervention but, at any rate, the National Cash Register Company has a right to fully and completely put in their entire case to support what they are trying to do. Later on we can discuss whether or not they are within their rights.

By Mr. Garver:

Q. Mr. Allyn, do you know what other companies besides Allyn-Wales make adding machines?

A. There are at least eight other companies—I mean seven other companies.

Mr. Garver: It has been stipulated that the figures on this chart show the sales of adding machines in 1941 by the nine manufacturers. I would like to offer that in evidence.

The chart so offered in evidence, entitled "1941 Adding Machine Sales," is made part of this record as *Petitioner's Exhibit No. 18*.

Mr. Garver: This chart, your Honor, shows in 1941 the total sales of adding machines were \$31,822,000.

Mr. Seasongood: So far as this represents the R. C. Allen Company this is incorrect.

[fol. 53] The Court: It is correct?

Mr. Seasongood: It is incorrect. According to Mr. Allen, the figure is incorrect.

Mr. Graydon: Do you want to correct it?

Mr. Seasongood: Sure. I want to come in to see that it is corrected.

At this point a recess was taken until 2:00 o'clock in the afternoon of the same day, Monday, November 15, 1943.

Mr. Moyer: If your Honor please, at this time, in support of the stipulation, I would like to offer for the inspection of the Court a questionnaire that was sent out to a number of Allen-Wales distributors, and replies received from 22 dealers—that is all the replies we received to the questionnaire—stating the effects on their business and the competition at distribution level of the proposed acquisition. The stipulation provides that this is offered for inspection by the Court, and also that National's counsel can offer any comments on the communications that they desire to.

Mr. Garver: We reserve objection to those, on the ground of materiality and relevancy. We agreed that they could be put in and examined by the Court, but we do want to register an objection to them as being immaterial and irrelevant.

Mr. Moyer: I take it on the ground that you would object to any issue of competition at the distribution level being involved in the case, rather than to these particular documents.

Mr. Garver: Our position is, your Honor, that the only question before the Court is whether there is any substantial competition between the corporation which is making the purchase and the corporation which is being sold, and if the result of the acquisition would be to substantially lessen competition between those companies.

[fol. 54] The Court: Yes. I understand the Government's opposition is limited to that, that you are opposing just on that ground alone.

Mr. Moyer: We could state our position that way, although our position is based not only on the direct competition in the machines that are being manufactured and on the potential competition in connection with adding machines, but also the effect on competition at the distribution level. National has a distribution system that it owns and controls entirely. It determines every detail of that. Allen-Wales sells through independent distributors that can go out and offer special services, they can offer special deals on trade-ins, they can maintain a market for used machines. National Cash Register determines whether a used machine shall be junked or sold.

The Court: I know, but it is here for permission to proceed under this decree, and you see nowhere is there any sug-

gestion in the decree about this matter that you are talking about.

Mr. Moyer: Oh, the original complaint—

The Court: —I understand, but we are talking about the decree.

Mr. Moyer: Provided it does not reduce competition.

Mr. Graydon: Between the buyer and seller.

Mr. Moyer: It does not say between buyer and seller in the decree, reading the term counsel is referring to, one provision in the Clayton Act. We are interpreting a decree which goes at least as far as Sections 1 and 2 of the Sherman Act as well as the Clayton Act, plus the provisions in the decree. If the decree merely incorporates the Clayton Act it does less than the antitrust laws would otherwise provide. We take it that the decree incorporates a future course of conduct to meet a pre-existing situation, and the provision of the decree, "and that the acquisition will not substantially lessen competition," that is not limited in its scope and, in any event, on a narrow interpretation on the scope of competition between these two companies certainly the distribution systems are an important element in the competition.

The Court: You make your record, you see. You are offering them subject to the objection that they are not relevant; is that your position?

Mr. Moyer: Yes.

Mr. Garver: If your Honor wishes to accept these letters in response to a letter written by the Attorney General we would like to submit for your inspection a memorandum which covers all these Allen-Wales dealers and distributors, and which has—

The Court: —That can follow along in rebuttal.

Mr. Garver: We would like to submit it to your Honor.

Mr. Moyer: I have no objection to the material incorporated in this.

Mr. Graydon: As I understand, your Honor, the Department wrote letters to all the Allen-Wales agencies.

Mr. Moyer: Not all of them. We wrote to forty-three and I believe we have twenty-two replies.

Mr. Graydon: All right. They express a certain attitude. Now we have a complete investigation on our part of a great many more of those dealers, and we want the whole attitude before the Court.

Mr. Garver: This does not state the attitude. This isn't letters, but it is information from Dun and Bradstreet on their own letter-heads, as to what kind of business they do. A great many of them were in business years before they got Allen-Wales adding machines. In other words, the contention of the Department is that if these men cannot get Allen-Wales adding machines they will have to go out of business.

The Court: Well, I question the propriety of the letters; [fol. 56] and your position is not under oath, and I say I will receive it conditionally, just to enable you to make up the record, so if the Court of Appeals wants to have anything to do with it, it will be before them.

Mr. Graydon: We don't know whether the Court of Appeals has anything to do with it.

The Court: I don't either.

Mr. Moyer: This is covered by the stipulation. Under existing conditions we did not want to subpoena in forty or fifty dealers. The statements are before the Court under the stipulation, and any comment National wishes to make on them—

The Court: —For practical purposes let us let them in.

The folder referred to, containing photostatic copies of statements by dealers of Allen-Wales Adding Machine Corporation, is made part of this record as Government's Exhibit No. 105.

Mr. Garver: This memorandum, which is prepared by Allen-Wales Company, which we would like to submit with the letters, contains a list of all of their sales dealers and distributors. It gives the date when each started in business, it gives the date when they made a contract with Allen-Wales, and it contains information from their own letter-heads and from Dun and Bradstreet as to what business they are in.

The Court: Let the Government put theirs in.

Mr. Moyer: We are also offering communications received from each of the manufacturers of adding machines, giving an outline of the distribution systems.

The folder referred to, marked "Adding Machine Distribution Systems," is made part of this record as Government's Exhibit No. 106.

Mr. Moyer: If the Allen Calculators, Inc. status would permit them to put their Mr. Allen on and cross-examine him, I would defer to their examination at this time.

[fol. 57] The Court: Have you any other witnesses?

Mr. Moyer: We have no additional witnesses except Mr. Allen, unless Allen Calculators, Inc. is permitted to examine him first.

The Court: If Allen Calculators, Inc. is not permitted to intervene will you call him as your witness?

Mr. Moyer: What is the status of the intervenor at this time?

The Court: I would say that the intervention was received conditionally this morning, and I don't see anything that developed here. This is an original proceeding by the United States against the National Cash Register Company, and we are passing on the decree which grew out of the litigation at that time between those parties. I think it would be unreasonable at this time to—

Mr. Moyer: —I will call Mr. Allen.

Mr. Seasongood: I understand your Honor rules we are not permitted to intervene.

The Court: Yes. As I say, the original proceeding was between the United States Government and the National Cash Register Company, and we are just considering the decree growing out of that litigation, and it would be unreasonable at this late date to permit intervention by your client. So you may have an exception and take such other position as you would want to, and if you later want to file a brief as a friend of the Court I don't see that there is any objection to that.

Mr. Seasongood: Of course, we haven't had the right to cross-examine or any of the rights of a litigant in the case.

The Court: I understand, but occasionally the Court permits briefs to be filed without actually taking part in the case, but I think that is about as far as we can go.

[fol. 58] Thereupon, RALPH C. ALLEN, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Examined by Mr. Moyer:

Morning Session, Tuesday, November 16, 1943

Court met pursuant to adjournment. This matter coming on for further hearing, and counsel being present as heretofore noted, the hearing proceeded as follows:

Mr. Seasongood: Your Honor, I have an entry overruling the application to intervene, of which I have given copies to the Government and opposite counsel. It is satisfactory to the Government. I haven't heard from the other gentlemen.

Mr. Graydon: It is not satisfactory to us, your Honor, for the reason that your Honor will note that after providing that the Court overruled said motion to intervene it proceeds with this language: "upon the ground that the relief requested by the petition of the National Cash Register Company in the above cause affects the decree heretofore entered therein and the only parties involved in such controversy are the Government of the United States and the National Cash Register Company." It seems to me it is entirely unnecessary and improper for your Honor to state a particular reason for your action, in view of the fact that there might be several other good reasons. Among others, I might mention the fact that although counsel for the proposed intervenor was advised of this proceeding at least three weeks, and one of his associates consulted your Honor, they said nothing to us, and at the last moment come in with an intervention, after we had prepared to answer the rather simple answer of the Government, bring in eleven pages of matter that we never had a chance to look into. That would be a good and sufficient reason, in the discretion [fol. 59] of the Court, for refusing this belated attempt to intervene. And I would suggest that your Honor needs to give no reason after the words "overruled said motion to intervene, to which ruling Allen Calculators excepts." If your Honor states one reason they might claim that was not a good reason, and then you would not have the benefit of another.

Mr. Seasongood: If your Honor please, the reason your Honor gave for overruling the application should be stated. That is the reason that your Honor gave. If you want to go into these other matters, that matter was not adduced, was not objected to, there was no objection on that ground whatsoever. If there had been it would have been explained as to why what has been done was done, and that is that the Government did not file its answer until shortly before this hearing, and that it was impossible to present the matter any sooner. That matter was not argued and was not the basis of your Honor's decision.

The Court: I simply stated this was a proceeding between the Government and the National Cash Register Company.

Mr. Seasongood: That is right, and that is what we tried to state there. We are only embodying that there, and that was your Honor's basis for not permitting us to intervene.

Mr. Graydon: I don't know how you can say that the Court did not permit you to intervene on that ground only.

Mr. Seasongood: You can't at this stage make objections which you did not make when we presented the petition which the Court did not consider.

The Court: I think you can until the close of the case, and thereafter if it is important.

Mr. Graydon: He presented it and your Honor said tentatively you would take it. You were postponing it.

Mr. Seasongood: And then I called attention to Section 16 of the Clayton Act, which seemed to give us an indubitable right to intervene.

[fol. 60] Mr. Graydon: No—

Mr. Seasongood: —You express your opinion and it doesn't matter whether it is correct or not,—it is a correct decision. I think your Honor ought to accord us an entry which shows what took place. That is to say, it was presented, there was an objection to it that we had no standing in the case. And that is the position your Honor took, and we were refused the right to intervene and our rights have been lost. We were not permitted to cross-examine, we were not permitted to adduce evidence from the president of our own corporation, and, we think, to have assisted the Court by our participation. But that was denied us. I think the entry should show what took place, and not an afterthought of counsel as to something that might have been objected to, which the Court never heard, and never asked for any hearing. The Court decided it on that ground that is stated in the entry.

The Court: If you will let me read it just a moment. (After examining entry): Of course, the point about it is I wouldn't want this entry to go on because, as I say, I gave you an opportunity to furnish authorities. Of course, you suggest the Clayton Act, but I wouldn't want this matter here to turn on that one ground alone. You can prepare an entry overruling your petition to intervene, and that is all there is to it, because we did not go into the matter fully.

Mr. Seasongood: Your Honor precluded us from going into it by going ahead with the case and not letting us cross-examine. What would be the sense of our intervening this

morning, when the case is all over? We couldn't render the assistance to the Court which we had hoped to render.

Mr. Graydon: Your president was on the stand.

Mr. Seasongood: Well—

Mr. Graydon: You mean you could have done it better than the Government?

The Court: Are we ready for argument?

[fol. 61] Mr. Graydon: Yes.

Mr. Seasongood: Does your Honor refuse to enter it?

The Court: Yes.

Mr. Seasongood: What entry does your Honor want?

The Court: I want an entry that your petition to intervene is overruled.

Mr. Seasongood: Strike it out and fix it the way—your Honor wants to, giving us our exception and objection.

The Court: I think that the record should show that the Court does not consider this entry fair, in that it has to be bound on that one ground without going into it fully (handing document to Mr. Seasongood).

Mr. Seasongood: Couldn't your Honor just fix it the way you think it should be, so we get through with it?

The Court (After examining the entry again the Court handed it to Mr. Seasongood).

Mr. Moyer: If the Court please, I have two additional Government exhibits that I don't believe there will be any objection to.

Mr. Seasongood: Does your Honor want me to have it rewritten, or do you want to strike it and sign it?

The Court: No. Miss Doyle will re-write it for you.

Mr. Seasongood: And, also, I think your Honor has the notice and the proposed answer. Could those be initialed or identified? Of course, we couldn't file them because we weren't a party—just so we can have that those were the ones that we did present to the Court. I don't want to attach them to the entry. I don't suppose that would be acceptable. (After the Court handed another document to Mr. Seasongood): Then I may hand those to the stenographer, for identification as to the notice, proposed answer and proposed order submitted to the Court.

The documents referred to were thereupon marked for the purpose of identification Proposed Intervenor's Exhibits A, B and C, respectively.

• • • • •

[fol. 62] Thereupon Mr. Graydon proceeded with his opening argument and at its Conclusion Mr. Moyer proceeded to answer. Before Mr. Moyer had concluded a short recess was taken, after which the following took place:

Mr. Seasongood: Your Honor, could we have this entry? I have given them copies and now it has been stricken out, "on the ground that the relief requested by the petition of the National Cash Register Company in the above cause affects the decree heretofore entered herein and the only parties involved in such controversy are the Government of the United States and said National Cash Register Company"—that is stricken out as your Honor directed and it is rewritten with those words out and copies furnished to counsel (handing entry to the Court).

[fol. 63] EXCERPT FROM ARGUMENT OF SPECIAL ASSISTANT,
MOYER, TO THE ATTORNEY GENERAL

Mr. Moyer: I am referring to the first portion of the paragraph * merely to lay the foundation for calling the Court's attention that this does not involve merely the scope of the Clayton Act or, for that matter, merely the scope of the Sherman Act or Section 5 or 6 of the Federal Trade Commission Act. This involves a general prohibition, with the exception I believe interpretable only in terms of the general prohibition. * * * Then there is an exception, an escape provision. And under what terms does it operate? It operates first upon the filing of a petition—that has been done—in which reasons have been stated, and then we come to an important condition of the escape clause, "and if the Court upon investigation into all the circum-

[fol. 64] stances of the case"—unlimited, as broad as the previous prohibition.

And I might interpolate here, your Honor, that I have not regarded this proceeding, and I don't believe proceedings under this decree are properly regarded as an adversary proceeding between the Government and the National Cash Register Company. Rather, the Court is charged under this

* Second (p) of decree of Feb. 1, 1916.

decree with determining the scope of the investigation and all the circumstances, and we of the Department of Justice are in effect acting as commissioners in presenting to this Court information and data upon which the Court can act. And I might say at this time that if the Court believes that we have been deficient in providing the Court a full picture of all the circumstances, if the investigation doesn't cover what the Court believes it is charged with doing upon its investigation, we will gladly undertake to supply any deficiencies with respect to presentation.

[fol. 65] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 66] PETITIONER'S EXHIBIT 1

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE NATIONAL CASH REGISTER COMPANY, et al., Defendants.

STIPULATION

For the purposes of the hearing on the petition of The National Cash Register Company, filed herein on August 30, 1943, for approval of the acquisition by it of all or not less than 95% of the common stock and all or not less than 50% of the preferred stock of Allen-Wales Adding Machine Corporation, under the final decree entered herein on February 1, 1916, it is stipulated between the attorneys for the United States and the attorneys for the said petitioner, The National Cash Register Company, as follows:

I. The following allegations in the said petition are admitted: Paragraphs I, II, III (omitting the words in the third sentence "To a very limited extent"), IV, sub-paragraph 1 of Paragraph V and sub-sub-paragaphs (a), (c) and (d) of sub-paragraph 3 of Paragraph V, and the third sentence in Paragraph VI.

II. The original of the contract referred to in Paragraph IV of the said petition will be produced at the hearing and a copy may be marked as an exhibit in evidence. The same applies to supplemental agreement between the same parties dated March —, 1943, and agreement between The National [fol. 67] Cash Register Company and W. J. Pickering, dated February 26, 1943.

III. The National Cash Register Company has submitted to the Attorney General two volumes of charts containing various statements, sales figures, descriptions of machines and illustrations thereof. The following matter in Volume One of the said charts is admitted to be correct:

- (a) The summary figures in regard to the Allen-Wales Adding Machine Corporation, on page 7;
- (b) The statement (page 8) that 94.2% of Allen-Wales 1941 sales were adding machines;
- (c) Page 9 is an illustration of a typical model of Allen-Wales adding machine;
- (d) The 1941 figures of sales of adding machines by various manufacturers, shown on page 10, are substantially correct;
- (e) Page 12 shows illustrations of typical adding machines of nine manufacturers;
- (f) The comparative figures shown on page 14 of various companies are substantially correct;
- (g) The comparative figures shown on page 18 for 1941 sales of adding machines by National Cash Register Company and Allen-Wales are correct;
- (h) The statements with respect to 1941 on page 19 are admitted, with the exception of the last paragraph;
- (i) The comparative figures of 1941 accounting machine sales of National Cash Register Company and Allen-Wales, shown on page 22, are correct;
- (j) The comparative figures shown on page 24 of 1941 sales of National cash registers and Allen-Wales combination adding and cash drawer machines are correct.

[fol. 68] IV. The Attorney General has written a form letter to certain of the present dealers and distributors of Allen-Wales adding machines and has received letters from some of them in reply. A copy of the said letter written by

the Attorney General, and the replies received thereto, may be presented to the Court at the hearing for its inspection. No objection thereto will be made by the petitioner on the ground of hearsay or incompetency; but the petitioner reserves the right to object to the same on the ground of irrelevancy and immateriality, and to comment on the value of such letters as evidence because of lack of opportunity for cross-examination, and in so far as they may contain expressions of opinion. The same shall apply to any letters written by the petitioner or by the Allen-Wales Adding Machine Corporation to Allen-Wales dealers and distributors and to any replies received thereto.

V. The decree may contain a provision that no approval has been asked in this proceeding of the validity of any patents owned by the petitioner or by the Allen-Wales Adding Machine Corporation or the legality or validity of any patent license agreements or arrangements to which the petitioner or the Allen-Wales Adding Machine Corporation may be a party.

VI. The Allen-Wales Adding Machine Corporation did not manufacture and sell any bookkeeping machines before 1938, and did not manufacture and sell any adding-cash drawer machines until 1940. Its sales of such machines [fol. 69] in subsequent years have been as follows:

<i>Bookkeeping machines:</i>	<i>Units</i>	<i>Dollar Value</i>
1938.....	2	\$825
1939.....	4	1,650
1940.....	87	33,228
1941.....	257	103,332
1942.....	191	75,356

Adding-Cash Drawer machines:

1940.....	306	52,618
1941.....	327	56,640
1942.....	171	31,259

Ernest S. Meyers, Elliott H. Moyer, Attorneys for the United States. Joseph S. Graydon, Chauncey B. Garver, Attorneys for the Petitioner, The National Cash Register Company.

"A"

Dear Sir:

The final decree entered on February 1, 1916, in the Antitrust case entitled United States of America v. The National Cash Register Company, et al., among other things, enjoins the National Cash Register Company as follows:

From acquiring ownership or control directly or indirectly, by means of stock ownership or otherwise, of the whole or an essential part of the business, patents, or plant of any competitor engaged in the manufacture or sale of cash registers or other registering devices in interstate or foreign commerce; Provided, that in case any such acquisition is desired, a petition may be presented to this Court stating the reasons therefor, and if the Court upon investigation into all the circumstances of the case and after notice of not less than sixty days to the Attorney General shall determine that such business or patents or plants so desired to be acquired will supplement the plant, patents, machines or facilities of the defendant's corporation and that the acquisition thereof is desired for that purpose and will not substantially lessen competition, then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as might be right.

The National Cash Register Company has, in accordance with the above quoted paragraph of the 1916 decree, filed a petition with the United States District Court at Cincinnati, Ohio, requesting that the court grant permission to the National Cash Register Company to acquire stock of the Allen-Wales Adding Machine Corporation.

We are informed that you are a dealer or distributor of the products manufactured by the Allen-Wales Adding Machine Corporation and, in connection with the petition of the National Cash Register Company, we would appreciate a rather detailed statement from you as to the following:

- (1) The extent to which you and the distributors of the products of the National Cash Register Company compete with respect to the sale and servicing of new and second-hand business machines.
- (2) The probable effects upon your competitive position with respect to other distributors of business machines or office equipment, if you could no longer handle the products of the Allen-Wales Adding Machine Company.
- (3) What would be the effect on your competitive position if Allen-Wales products were distributed exclusively through representatives of the National Cash Register Company?
- (4) Would substitutes for the Allen-Wales line be readily available to you from other manufacturers? Answer separately for each type of Allen-Wales machine which you handle.
- (5) Are Allen-Wales products or substitutes for such products essential to a business such as you are conducting? Why?
- (6) What do you consider the future prospects for the sale of Allen-Wales commercial bookkeeping or accounting machines and the Allen-Wales combination adding and cash drawer machines? Why?

In furnishing the above information, it should of course be assumed that full production of business machines for general distribution will be resumed as soon as conditions permit.

Very truly yours

WENDELL BERGE
Assistant Attorney General

P. P. LYNCH TYPEWRITER CO.

1680 CHESTER AVENUE, BAKERSFIELD, CAL.

PHONE: 4448 Sept 22nd 1943

The Attorney General
Washington D.C.

Dear Sir:

E.H.W.
Ref: 60-61-0

#2

The National Cash Register Company are Competitors of
mine,,in Service and Sales-

#2

I would not be permitted to handle the Allen Wales products.

#3

To a certain extent, it would injure my business.

#4

Yes. Substitutes for most Allen Wales Models, are available.

#5

Yes. Adding machines make up one third of my business.

#6

The future for Allen "ales Adding machines for Bookkeeping,
and Cash Registers, is very good, for the reason the Allen Wales
is a high class product

Very truly

P.P.Lynch

The Attorney General
Washington D.C.

Dear Sirs:

E H M.

60-51-0

Ref:

#2

The National Cash Register Company are Competitors of
mine,,in Service and Sales-

#2

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Very truly

P.P. Lynch

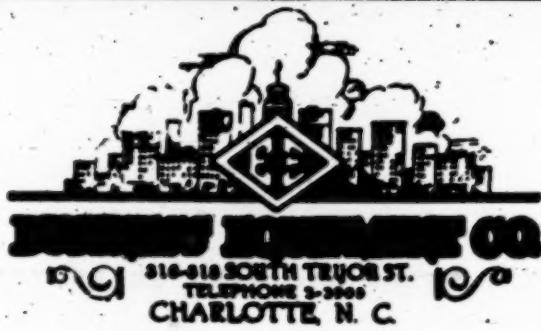
60-51-0



HEADQUARTERS FOR BUSINESS MACHINES

SALES
SERVICE

SUPPLIES
ACCESORIES



BUSINESS EQUIPMENT COMPANY
316-18 S. Tryon St.
Phone 2-2995 Charlotte (2), N. C.

October 15th, 1943.

The Attorney General,
Department of Justice,
Washington, D.C.

Ref. B H M

60- 51- 0

Dear Sir:

Replying to yours of the 5th, regarding the National Cash Register Co., and The Allen Wales Adding Machine Corporation, we will reply by paragraph as follows:-

(1) To no extent of consequence, as we only service cash registers when a customer so request us to do so.

(2) The probable effect would be, that as we could not compete with other distributors, we would have to discontinue business, as the products of the Allen Wales Adding Machine Corp., has been our chief item of existence.

(3) Answer is the same as (2) above.

- (4) No: Hand operated adding and subtracting machines-
No: Electrically operated adding and subtracting machines,
No: Statement adding and subtracting machines,
No: Bookkeeping and Posting machines,
No: Duplex and Grand Total machines,
No: Registering Cash Drawer machines.

Similar machines of other makes are distributed through company offices in this territory.

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No: Electrically operated adding and subtracting machines,
No: Statement adding and subtracting machines,
No: Bookkeeping and Posting machines,
No: Duplex and Grand Total machines,
No: Registering Cash Drawer machines.

Similar machines of other makes are distributed through company offices in this territory.

(5) Yes: Because we have our small organization trained only on this line of machines.

(6) Good: Because there seems to be a growing demand for better featured machines, as the Allen Wales Corp., will have to offer. We speak only for this section.

Very truly yours,

BUSINESS EQUIPMENT CO.,

C. W. Harris,
W. W. Harris, Partner.

ALLEN WALES ADDING MACHINES
SALES AND SERVICE

7m 1

n. Mass.

September 28, 1943

The Attorney General
Department of Justice
Washington, D.C.

Ref: E.H.M. - 60-51-0

SEARCHED

OCT 1 1943

Dear Sir:

I am answering questions asked me in your letter of Sept. 15th as follows. Nothing in these replies is said because of animosity toward either Allen Wales Adding Machine Corporation or National Cash Register Company - but simply to state that I am being eliminated from a business I have built, and have no reason to do other than state so plainly.

1. Competition between our products in this district is small. Our accounting machine line, while holding considerable promise, was not sufficiently developed as to features, etc., to be real competition. We have sold a number of cash drawer combinations but I should say only two or three per cent of our sales in the last year before restriction were made in competition with National Cash Register Products.

2. I would have no competitive position. I have handled Allen Wales in Boston for sixteen years and have no sidelines whatsoever, partly because Allen Wales has frowned on them, partly because it has taken all my time to do the job right. I have given twenty-three years to Allen Wales and Wales exclusively. With the Allen Wales line, I am naturally a strong competitor in this territory. Without it, I have nothing to compete.

3. I would lose everything I have worked for, and the National Cash Register Company, for a time at least, would inherit the fruits of my labor in building up accounts and confidence in Allen Wales, besides money I have invested both in salesmen and in a competent service force. I would simply have no competitive position.

I am answering questions asked me in your letter of Sept. 15th as follows. Nothing in these replies is said because of animosity toward either Allen Wales Adding Machine Corporation or National Cash Register Company - but simply to state that I am being eliminated from a business I have built, and have reason to do other than state so plainly.

1. Competition between our products in this district is small. Our accounting machine line, while holding considerable promise, was not sufficiently developed as to features, etc., to be real competition. We have sold a number of cash drawer combinations but I should say only two or three per cent of our sales in the last year before restriction were made in competition with National Cash Register Products.

2. I would have no competitive position. I have handled Allen Wales in Boston for sixteen years and have no sidelines whatsoever, partly because Allen Wales has frowned on them, partly because it has taken all my time to do the job right. I have given twenty-three years to Allen Wales and Wales exclusively. With the Allen Wales line, I am naturally a strong competitor in this territory. Without it, I have nothing to compete.

3. I would lose everything I have worked for, and the National Cash Register Company, for a time at least, would inherit the fruits of my labor in building up accounts and confidence in Allen Wales, besides money I have invested both in salesmen and in a competent service force. I would simply have no competitive position.

4. Our adding machines which constitute 95% of our business. I could not get a substitute which would hold 10% of my business. Adding machine business calls for features not available on any substitute to hundreds of customers using special machines, such as fractions, automatic counts (leather and textiles) grand totals in banks and other places. Moreover, I have a high grade list of customers including about 150 banks which could not be sold anything even possibly available. On Cash Drawer combinations, there is nothing I know of. On bookkeeping line, nothing available.

The Attorney General

September 22, 1943.

5. Allen Wales or substitutes are essential as Allen Wales sales and service are my entire business. I have an office and service department on which considerable money has been spent, and thousands of dollars and sixteen years of hard work have been spent in building a reputation for Allen Wales. I have no way of even keeping the service, as National Cash Register Company would not sell me parts even if my customers wanted to stay with me. If I tried to stay in business, the National Cash Register Company would soon eliminate me. Allen Wales has always claimed I own my own business. Now it is being sold without my being able to do anything about it and the Company is being paid not only for its factory, tools, etc., but for my business..

6. If Allen Wales does, when conditions allow, anywhere near what it has spoken of doing on its accounting machine line, it would certainly have great possibilities. It's chief lack at present is in automatic features which I have been told would come. I believe much of the work on these has been done. With thousands of Allen Wales adding machines in use in Boston, the accounting machine will sell if it can do the job. My customers have confidence in our products.

Very truly yours,

A. L. Anderson

ALA-K

A. L. Anderson

[fol. 76] PROPOSED INTERVENOR'S EXHIBIT "A" (IDEN)
B.M.C.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF OHIO, WESTERN DIVISION

In Equity No. 6802

THE UNITED STATES OF AMERICA, Plaintiff

v.

THE NATIONAL CASH REGISTER COMPANY, et al., Defendants

SIRS:

Please Take Notice that upon the annexed proposed answer of Allen Calculators, Inc., duly verified on November 15, 1943, and upon all the proceedings heretofore had in this cause, we shall move this Court at a term thereof to be held at the Federal Building, in the City of Cincinnati, County of Hamilton, in the Southern District of Ohio, for an order permitting Allen Calculators, Inc. to intervene herein upon the ground that the intervenor is engaged in commerce between the states and with foreign nations in adding machines, bookkeeping machines, calculators and cash register combinations, and that the proposed acquisition by National Cash Register Company of the stock in Allen Wales Adding Machine Corporation will materially and unreasonably restrain interstate and international commerce in such articles of commerce and will tend to create a monopoly in National Cash Register Company in respect of such articles of commerce;

And at the same time and place Allen Calculators, Inc. will move for such other and further relief as may be just [fol. 77] and equitable in the premises.

Yours, etc. Paxton & Seasongood, Solicitors for Allen Calculators, Inc., Petitioner for Intervention. Murray Seasongood, Esq., Frank R. Bruce, Esq., Of Counsel.

[fol. 78] PROPOSED INTERVENOR'S EXHIBIT "B" (IDEN)
B.M.C.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF OHIO, WESTERN DIVISION

In Equity No. 6802

THE UNITED STATES OF AMERICA, Plaintiff,

v.

THE NATIONAL CASH REGISTER COMPANY, et al., Defendants

ANSWER OF ALLEN CALCULATORS, INC.

To the Honorable the Judges of the District Court of the United States in and for the Southern District of Ohio, Western Division:

Allen Calculators, Inc., answering the petition of the National Cash Register Company filed in this Court and cause on August 30, 1943, respectfully alleges as follows:

1. Allen Calculators, Inc. is, and for over ten years past has been, a corporation duly organized and existing under the laws of the State of New York. It has its manufacturing plant in Grand Rapids, Michigan; where it is engaged in the production of articles for interstate and international commerce, to wit:

- (a) adding machines,
- (b) bookkeeping machines and statement machines,
- (c) calculators,
- (d) cash register combinations.

[fol. 79] 2. Throughout said period of time Allen Calculators, Inc. has been engaged in commerce in respect of said articles between the several states of the United States and with foreign nations, and particularly has been engaged in such commerce between the state of Michigan and the state of Ohio and the Southern District, Western Division thereof.

3. The basic principles underlying the cash register, the adding machine and the other articles of commerce enumerated above are substantially the same and are based upon

devices whereby mathematical sums may be automatically added or otherwise dealt with by devices which record and print the totals or sums of such mathematical formulae. In its simplest form, a cash register is nothing more than an adding machine, plus a cash drawer and a mechanical device for indicating for the customer's view the amounts recorded on the machine. In recent years, there has developed a trend whereby the recording for the customer's view of the sum total of the purchases is not required, which makes a less expensive and less cumbersome machine. There is thus a degree of interchangeability between the cash registers and counting machines, so that the mechanical concept and the engineering required for the two types of machine are measurably interchangeable; and the two types of machine are allied in their field or, in the broader concept, are merely branches of the same field.

4. Your petitioner respectfully submits that, as appears from the petition of the National Cash Register Company itself, the manufacturing facilities and personnel of the cash register business is adequate to manufacture adding machines; and the mechanical skill in developing one or the other type of mechanical counting machines is substantially the same whether the machine is called a cash register or an [fol. 80] adding machine. Thus, no reason is shown in the petition of the National Cash Register Company why the National Cash Register Company should not develop its own line of adding machines or similar machines if it wishes to develop that phase of the counting machine business.

5. The material thing which the National Cash Register Company seeks to acquire through the acquisition of Allen Wales Adding Machine Corporation is to draw to itself the interstate business and good-will developed by Allen Wales Adding Machine Corporation as an independent competitor and thus eliminate that company from the competitive field. It is not necessary to recite the steps whereby National Cash Register Company acquired its preponderance in its field. It is significant, however, that when in the past National Cash Register Company has acquired a competing unit, it has absorbed the manufacture of its products into its integrated unit. The result of such integration was: Whereas a normal decree in a monopoly case is that the monopoly be dissolved into its constituent elements so as to create

a condition in harmony with law, yet no such decree was possible in the case of National Cash Register Company because all of its constituent elements had been integrated into a single plant. Thus, where there has been no decree of dissolution to restore competitive conditions, it is highly essential that the independents be permitted to develop without interference or control, until by their independent growth true competitive conditions in harmony with law shall have been restored; but, on the contrary, National Cash Register Company still exercises predominant control in its field.

It is noteworthy that National Cash Register Company proposes with respect to the Allen Wales Adding Machine Corporation to withdraw its manufacturing plant from Ithaca, New York, and integrate it into its plant in Dayton, Ohio, thereby disturbing the relationship of some four hundred [fol. 81] employees in the Ithaca plant and disturbing the course of commerce of its products from New York to other states and nations.

6. It is respectfully submitted that the petition of National Cash Register Company in its final analysis means only this: that competition in the field has developed an article in trade which National Cash Register Company would like to own and, therefore, National claims the right to buy it and make it part of National's existing predominant control in the industry. If this view were accepted, the effect of the decree herein of February 1, 1916 would be neutralized.

7. Allen Calculators, Inc. has developed four divisions, more or less, known as the R. C. Allen line, namely:

- a—Adding Machines low priced for mass consumption
- b—Bookkeeping and Statement Machines
- c—Calculators
- d—Cash Register combinations.

With the exception of a few large cities, namely New York, Chicago, Philadelphia, Boston, Washington and Cleveland, the sale of the above lines is and has been, since the Company started in business eleven years ago, always from the dealer organization, who are better known as "Storekeepers." That is, they pay their own rent, buy and sell mer-

chandise of all kinds in the office equipment world, and treat the R. C. Allen line as one of their potential money-makers. They buy at an established discount rate. About 90% of the business of Allen Calculators, Inc. has and does come from dealers. The Allen Wales Adding Machine Corporation competes with substantially the same lines of articles and in substantially the same manner, marketing its products in interstate and foreign commerce largely through independent dealers.

[fol. 82] 8. The following companies sell their products through a directly controlled agency commission basis, namely Burroughs, Sunstrand (Underwood, Elliott-Fisher), Monroe and Remington-Rand. (It is believed that the Réminington is marketed in some part through independent dealers and the balance through their own sales organization.) These four large companies secure approximately 70% of all business. The independent concerns are as follows:

Allen Calculators, Inc., Allen-Wales, Victor, Corona, Barrett.

9. This entire group of independents all sell adding machines in the low price bracket and market to a certain extent a combination adding machine register device that is quite popular although it differs from the more expensive cash register marketed by National and Burroughs in that it does not indicate to the purchaser the amount of the purchase nor give the purchaser a receipt therefor. Within the independent companies, Allen Calculators, Inc., has developed during the past few years by far the greatest volume of this combination adding cash register.

10. Allen Wales Adding Machine Corporation has also developed a combination cash register unit and no doubt has sold a reasonable quantity. However, Corona, a subsidiary of L. C. Smith Typewriters, Inc., has been selling for the past ten years a combination cash register unit and has been quite successful. Victor disposed of their right to sell a combination register to another concern called McCaskey, and they, as an independent company, purchased the mechanism of Victor and developed a very comprehensive line of combination cash register units, which company has distributed many thousands through inde-

pendent dealers. The least important independent of the [fol. 83] combination cash register units is the Barrett, a subsidiary of the Lanston Monotype Co. of Philadelphia. They have sold only a small number, but to some extent have been successful.

11. Thus, the picture of the combined total sales of all independents will show that each year the so-called adding machine-cash drawer combination units have mounted to a total in excess of 12,000 per annum. This, of course, is business not secured by National Cash Register Company, but if they purchase the Allen-Wales machine, they will be a formidable competitor against all independents, who will have reason to fear their competition.

12. In the cash register field, National Cash Register Company has a great preponderance, with some competition developed in recent years by Burroughs Adding Machine Company and with some competition from the cash drawer machine, as above indicated. Since the decree of February, 1916, one formidable competitor in the cash register field arose, namely, Remington cash register, which was backed by a group controlling almost unlimited capital. During this period, the competition was bitter and the Remington people found that they could not win out against the strongly entrenched sales position of National Cash Register Company, which had agencies and offices in all important centers, with each office having its own corps of local salesmen. As a result, the Remington people sold out to the National Cash Register Company and that name was taken off the market.

[fol. 84] 13. Until recent years National Cash Register Company did not invade the adding machine field, nor did the Burroughs Company invade the cash register field. In about 1929, National Cash Register Company purchased control of the Ellis Adding-Typewriting Company and was thus in possession of a substantial line of machines which contained the features of adding machines and billing machines. The name of this machine was then changed to National-Ellis and later to National. Thereafter, Burroughs started to develop its own cash register, which has been marketed under the name of Burroughs.

14. The situation as to the channels of distribution is this: National has its own complete distributing system, with machines billed to the distributor, and distributors are, in substance, agents of the Company, working on a commission basis. Machines are sent to these agents practically on consignment, so they need not be paid for until actual sales are made. This system pervades the country. On exactly parallel lines the Burroughs Company has its system for distribution.

15. The independent dealers are a group of local merchants dealing mainly in office equipment, office supplies and specialties, who handle all types of office equipment, including typewriters, mimeograph machines, cash registers, adding machines, bookkeeping machines, billing machines, and the ordinary supplies incidental thereto. They may also handle office furniture. These are independent dealers, that is, each one does business on his own, with his own capital, good-will and credit, and makes purchases from the manufacturer under the usual terms of discount [fol. 85] and credit. Such dealers will, as a rule, handle one make of machine by direct dealing with the manufacturer thereof, but will handle all types of rebuilt machines, whether made by the independents or by the large manufacturers; and, in fact, the rebuilding of older machines is quite a profitable part of their business.

16. It would be disastrous to the whole independent field if either the National Cash Register Company or the Burroughs Adding Machine Company would be permitted to invade the field of the independent dealer, which was built up by the independent manufacturer and is the sole outlet for competitive goods. To permit such invasion of the independent field would completely engross the markets, and would leave no possibility of competition because no independent manufacturer could build up his own distributing system nor could any such distributing system be built up except after years of effort. In like manner, the independent dealer has built up his business through independent effort over a period of years, and it would be highly dangerous to him if the two large companies (National and Burroughs) invaded the field with their terms of sales and other restrictions upon independent dealing, so that the dealer would become, in substance, the agency of one or

the other of the two large manufacturers and would lose his status as an independent dealer who buys and sells whatever the market affords and whatever is desired by his local customers.

17. To permit the National Cash Register Company to keep the name of Allen Wales and to market it through the independent dealer, just as was done when the company [fol. 86] was truly independent, would, in substance, be turning the Allen-Wales machine into a "fighting brand" or a "'knocker brand", because National Cash Register Company, being the owner of the Allen-Wales business and patents would be able to market the identical machine under its own name through its own sales organization and at a price commensurate with the higher prices charged for its other products and at the same time keep the Allen-Wales with the independent dealer at a lower price, which might be made still lower in order to get the custom controlled by the existing independent dealers. In this way, National Cash Register Company could control this type of machine, both through national distribution and through local distribution and thus effectively increase the control which National Cash Register Company already has in allied fields.

18. The National could swamp the independent market with its enormous manufacturing capacity, its mass production, its great amount of working capital, and the very considerable margin between its cost and selling price. It could place upon the dealers' shelves practically on a consignment basis unlimited quantities of Allen-Wales goods which the dealer would not have to pay for until the machines are sold. It could, by lowering the price or increasing the dealers' discount, make it impossible for the independent manufacturer to compete; while at the same time it would keep up the price of its products when sold through its own sales organization.

19. At present, there is fair competition for the dealer trade; but if National were admitted to the dealer trade, in [fol. 87] dependent competition would be hopeless and National would capture the dealer field.

20. To permit National to market under the Allen-Wales name would work a particular hardship upon Allen Cal-

culators, Inc. It was the same "Allen" who was in both Allen-Wales and in Allen Calculators, Inc. If National Cash Register Company should publicize the Allen-Wales name, the trade would get the impression that Mr. Allen had sold out to National and Allen Calculators, Inc., would lose the value of the name and good-will which Mr. Allen built up over many years of intensive effort in the adding machine and calculator field. It should be noted that Mr. Allen still claims an interest in the Allen-Wales company through litigation which is now pending.

21. It would be dangerous to permit National Cash Register Company to buy Allen-Wales Adding Machine Corporation, under any conditions. If the National Cash Register Company should market through the independent dealers the result would be, as shown above, that they could swamp the markets and drive all independent manufacturers from the field. If, on the contrary, they marketed the Allen-Wales line through their own sales organization, it would close one of the important sources of supply which keep alive those particular independent dealers handling the Allen-Wales line. If the National Cash Register Company should market both through their own sales organization and also through the independent dealers, obviously, this would be such an engrossment of the field as to destroy the possibility of fair competition.

[fol. 88] 22. In addition to its answer to the petition of National Cash Register Company in its entirety as above set forth, Allen Calculators, Inc., denies the following allegations in said petition:

Allegations in paragraphs III and subparagraph 2 of paragraph V which allege that Allen Wales Adding Machine Corporation has manufactured and sold commercial bookkeeping or accounting machines and combination adding and cash drawer machines to "a very limited extent" and that such machines are not directly competitive with the cash registers and accounting machines of National Cash Register Company; the allegation of paragraph V of said petition which alleges "that there is not now and that there never has been any substantial competition between your petitioner and Allen Wales"; and the allegation of paragraph VI of said petition which al-

leges "that the acquisition of the capital stock of Allen Wales by your petitioner will not have the effect of lessening competition in any measure".

Wherefore, Allen Calculators, Inc., respectfully requests that the petition of the National Cash Register Company filed herein on August 30, 1943 be denied.

Dated: Cincinnati, Ohio, November 15, 1943.

Allen Calculators, Inc., by Murray Seasongood, Paxton & Seasongood, Solicitors. Murray Seasongood, Esq., Frank R. Bruce, Esq., of Counsel.

[fol. 89] STATE OF OHIO,
County of Hamilton, ss:

Ralph C. Allen, being duly sworn, says:

I am President of Allen Calculators, Inc., the answering intervenor aforesaid. The foregoing answer is true, as I verily believe.

Ralph C. Allen.

Sworn to before me this 15th day of November, 1943,
Evans L. DeCamp, Notary Public. My commission expires Sept. 11, 1944. Hamilton County,
Ohio. (Seal.)

[fol. 90] PROPOSED INTERVENOR'S EXHIBIT "C" (IDEN.)
B.M.C.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF OHIO, WESTERN DIVISION

In Equity No. 6802—Order

THE UNITED STATES OF AMERICA, Plaintiff,

v.

THE NATIONAL CASH REGISTER COMPANY, ET AL.,
Defendants.

Allen Calculators, Inc., having moved this court for an order permitting it to intervene herein, and copies of the notice of motion and proposed answer of said intervenor having been served on the Attorney General of the United States and upon Joseph S. Graydon, Esq., attorney for

National Cash Register Company, and such application having been duly heard,

Ordered that said Allen Calculators, Inc., be permitted to intervene in this cause and that the answer of said intervenor to the petition of National Cash Register Company be filed.

[fol. 91] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

In Equity No. 6802

THE UNITED STATES OF AMERICA, Plaintiff,

v.

THE NATIONAL CASH REGISTER COMPANY, ET AL., Defendants.

EXCERPTS FROM STATEMENT OF EVIDENCE—Filed December 30, 1943

Before Honorable John H. Druffel, District Judge, at Cincinnati, Ohio, on November 15 and 16, 1943.

[fol. 92] Morning Session—Monday, November 15, 1943

OPENING STATEMENT FOR PETITIONER

Mr. Graydon: If the Court please, this is an old case running back to sometime around 1911; United States of America, Plaintiff, vs. The National Cash Register Company, Defendant. In that case a consent decree was entered in the year 1916 enjoining the National Cash Register Company, the predecessor of the present company, and its officers at the time, from continuing certain practices alleged in the petition to have been in violation of the Sherman Law. The Clayton Act had not as yet been enacted when the suit was filed, although it was effective when the decree was entered.

Paragraph Second, Subdivision (p), of that decree is the one under which we come here. It provided that the company and its officials, the defendants, should be enjoined

"from acquiring ownership or control directly or indirectly, by means of stock ownership or otherwise,

of the whole or an essential part of the business, patents, or plant of any competitor engaged in the manufacture or sale of cash registers or other registering devices in interstate or foreign commerce: Provided that in case any such acquisition is desired, a petition may be presented to this Court stating the reasons therefor, and if the Court upon investigation into all the circumstances of the case and after notice of not less than sixty days to the Attorney General shall determine that such business or patents or plant so desired to be acquired will supplement the plant, patents, machines, or facilities of the defendant corporation and that the acquisition thereof is desired for that purpose and will not substantially lessen competition, then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as may be right."

I may say to your Honor that upon two former occasions since 1916 applications similar to this were presented and heard and orders passed authorizing The National Cash Register Company to purchase property and assets, one under which, in 1929 upon a hearing and opinion by Judge Hickenlooper under circumstances very similar to this case, petitioner acquired the stock and assets of the Ellis Adding-Typeewriter Company. I will refer your Honor to [fol. 93] that particular precedent because I think it is very close to the case your Honor has before him now. Then there was another occasion in 1931 when Judge Hough passed on a similar application and authorized the purchase by an opinion delivered orally at the close of the testimony.

The present petition is for leave to acquire all or not less than 95% of the outstanding common stock and all or not less than 50% of the outstanding preferred stock of the Allen-Wales Adding Machine Corporation, a New Jersey corporation engaged chiefly in the business of manufacturing and selling Adding machines and, to a limited extent, bookkeeping or accounting machines and combination adding and cash drawer machines. I may say, your Honor, that is one of the machines referred to, that one right in the corner (indicating). You see, there is an adding machine and then it may be placed on a cash drawer.

Then the petitioner shows that a contract has already been made between these parties, which we will exhibit to

the Court, and it is to become effective upon approval by the Court and the issuance of an appropriate order.

I may say all of the National Cash Register Company's plants and business are now turned over to war work, except it does a certain amount of servicing and dealing in second-hand machines; but prior to its present war work its business consisted of (1) the manufacture and sale of cash registers comprising 76.2% of the business—I am referring now to the year 1941, the last year in which the normal functions of that plant and others continued, and (2) the manufacture and sale of accounting machines, which comprised 27.34% of its business. And they made no adding machines.

Now, Allen-Wales is a comparatively small company. Its total assets in 1941 were some \$1,600,000, and its gross sales \$2,900,000. It was just in the middle of nine companies in [fol. 94] the country manufacturing adding machines. We will have a chart that will visibly indicate these figures to your Honor, but I may say now that the companies called the Burroughs, Underwood Elliott Fisher, Remington Rand, and Victor were the four top leaders in the adding machine field and they accounted for 74.8% of the sales of adding machines in 1941, Allen-Wales accounted for 8%, and 17.2% was divided among four companies smaller than Allen-Wales, that is, R. C. Allen, who attempts to intervene now, Monroe, Corona and Barrett. I think it may bring home to your Honor immediately that 94.2% of the total business of Allen-Wales in adding machines in no possible sense could be considered competitive with any product of the National Cash Register Company. That is, the simple adding machine, hand or electrically operated, nobody contends, and the Government does not contend, that that 94.2% is competitive in any sense with the product of the National Cash Register Company. Allen-Wales furnished very little competition in the sale of adding machines as against Burroughs, Underwood and Remington, Rand. Those are big, powerful companies, well integrated, nationwide market coverage. For example, in 1941, the sales of Burroughs products were in excess of \$41,000,000, Underwood \$36,000,000, Remington Rand \$49,000,000, whereas Allen-Wales was \$2,900,000.

It is proposed that the National Cash Register Company acquire these adding machines of Allen-Wales. The Na-

tional Cash Register Company is a company that would furnish real competition to Burroughs, Remington Rand and Underwood. The sales of National Cash Register products, exclusive of war work, in 1941 were in excess of \$48,000,000, so that the acquisition of the Allen-Wales Adding machine by National Cash Register Company will promote competition for the benefit of the public by substituting a strong, integrated company with a national [fol. 95] spread for the comparatively weak Allen-Wales.

Another provision in the decree indicating circumstances in which the company should be permitted to purchase other companies was if the purchase would tend to supplement the line of The National Cash Register Company. And that was one of the grounds on which Judge Hickel-looper held that he would authorize the purchase of the Ellis.

It is clearly within the scope of the decree that Allen-Wales, if acquired by National Cash Register Company, will supplement the patents, machines or facilities of defendant corporation. The present products of NCR are only cash registers and accounting machines. Other large companies furnishing office equipment make and sell accounting machines and adding machines. National Cash Register Company desires to enter into that line. Essentially a line of adding machines is a supplement to a company making and marketing accounting machines. Many companies using cash registers and accounting machines also use adding machines. Banks and others using accounting machines for bank work, utility companies using accounting machines and Ellis machines for distributing, also use adding machines, to be further dealt with by the accounting machines. For example, a large department store records its sales on cash registers. All charge tickets are sent to the office and listed on adding machines and the lists are then incorporated into the customers' bills on accounting machines. So these three machines will constitute an integrated trinity of use and are commonly recognized as such in the trade generally. So much for that. That is the supplementing.

And we will show your Honor accurate definitions, partly stipulated, which will be set forth on charts, and also that there is no question of the acquisition of any patent rights in this case.

Now that, if it please your Honor, seems to present—

The Court: Will you amplify last remark about the patents?

[fol. 96] Mr. Graydon: There is no element of acquisition of patents or patent rights involved, and no issue is made on this point in the answer.

The Court: You mean that there are no patents on the Allen-Wales machines?

Mr. Garver: Your Honor, the patents that the Allen-Wales Company owns are not fundamental, as all fundamental patents have expired.

The Court: That is all I wanted to know.

Mr. Garver: We will be glad to give anybody a free license, a non-exclusive license, under any patents.

The Court: That is all I wanted to know.

Mr. Graydon: No fundamental ones, as I understand. Your Honor, that seems to me to state our case in substance, but your Honor will note that I have dealt now only with 94.2% and I therefore wish to anticipate and indicate what we understand the Government's position to be. Briefly, I think it is that in the difference of 5.8% there are some slight elements which are not really of any present competition but by nature of an order may be—peculiar types of machines to which I am about to refer—more of a possibility of future competition. We claim that there is no present substantial competition and that, therefore, the elimination of any competition, if there should be any, will not substantially lessen competition. The 5.8% in 1941 is comprised of two classes. Allen-Wales made a commercial bookkeeping machine, of a very simple type, of which it sold only 257 units for a total of \$100,000, and that comprised 3.7% of its product. That commercial bookkeeping machine is simply an adding machine with a few accounting features added, and the total of those features was restricted to two—your Honor will see one of those; it is a very simple device—whereas the National Cash Register accounting machines have as many as thirty features. We have these enormous bank billing or public utility bookkeeping machines [fol. 97] and the prices are as high as \$3,700. In 1941 the National Cash Register Company sold 4893 of these bookkeeping machines from \$550 up to \$3,700, whereas Allen-Wales sold only 257 of these adding machines with bookkeeping attachment, none for over \$450, and there is

no price competition whatever. So we suggest that that 3.7% supposed competition, if that is what the Government is aiming at, is infinitesimal and no real competition, no substantial competition.

The Court: Does the record show whether or not there are any basic patents owned by Allen-Wales covering this 3.7%?

Mr. Graydon: No, there are no basic patents.

The Court: I think the record ought to show that.

Mr. Garver: That is correct.

Mr. Graydon: That is correct, your Honor. That accounts for all the 100% of Allen-Wales in 1941 except 2.1%. In addition to 94.2% of adding machines and 3.7% of these small commercial bookkeeping machines Allen-Wales also has made and sold an adding machine with a cash drawer 00 that (indicating). Their sales totaled 327 units for a total of \$56,000, and they mention further that the acquisition of the Allen-Wales adding machine with a cash drawer would not take that product off the market because there are five or six others that make. It is not the elimination of any real competition. I want to point out to your Honor that an adding machine with a cash drawer on it is in no sense a cash register. The fundamental function of a cash register, the function recognized as fundamental in the patent suits in the Supreme Court of the United States, between the National Cash Register Company and the Boston Cash Register Company, back in the '90s, 156 U. S., pointed out that the fundamental thing about a cash register was that when a purchase was made the money was put in, [fol. 98] the price was shown to purchaser on an indicator, and by a simultaneous operation he visually saw the price, he received a receipt for that amount printed at the same time, and as a third operation the same transaction was printed on a locked-in tape which could not be tampered with. Now, the simplest form of a cash register has eight requirements: (1) the indication; (2) the receipt; (3) the detailed strip locked in; (4) what we call the transaction counter, which is a slip on which something of the nature of the transaction in addition to the amount, charge or cash, may be shown; (5) a locked-in total; (6) a printed total; (7) a single locked control so that only one person can open it; and (8) what is called a reset counter. Those eight qualities are required as essential by the National Cash

Register Company to constitute a cash register, and all of those qualities. This combined adding and cash drawer machine of Allen-Wales has only three. It has no indication; it lacks the protection which is the fundamental reason for a cash register, protection of the owner of the store against peculations, protection of the clerk against temptation, and the protection of the customer to know there is no incentive to overcharge him. The Allen-Wales adding machine with a cash drawer has no indicator and has no receipt. It has a detailed strip locked in and it has a lock-in total and it has a printed total—that is all.

In 1941 the National Cash Register Company sold 69,000 cash registers, including 16,500 at prices from \$150 to \$249. Allen-Wales, with its adding machine-cash drawer competed only in price with this class, selling 320 machines, and seven single machines in a slightly higher price bracket. So there is really no price competition between this combination of Allen-Wales and the simplest and cheapest cash register. So that in that year, as against 69,000 cash registers sold by the National Cash Register Company, Allen-Wales sold 327 in the low-price bracket, less than one-half of one percent. So we say the competition between Allen-[fol. 99] Wales bookkeeping machines and National accounting machines is purely an illusion both in respect to features and price. This will be shown not only by charts to be offered in evidence but also by such demonstration on a particular machine that your Honor may care to have.

Let me be fair to the extent of imagining the possibility of some slight competition. A small merchant whose selling day is over, if his cash register is cleared, can do adding on a cash register. He can do some adding. He can't do it while it is functioning as a cash register. And of course a large store would not think of doing adding on a cash register. Technically he could, but it is entirely an impractical and unbusinesslike way of carrying on a business. There are also instances where an adding machine with a cash drawer attached might be imagined as a substitute, although a very inadequate substitute, for a cash register. That would be where a merchant, say a man and his family, trusting each other, don't care about having to protect themselves against peculations of a clerk, they don't care about a thing that makes the cash register a cash drawer.

A man runs a shop and has no clerk. Maybe his customers trust him and they don't care about seeing the price he charges them or don't care about a receipt; he could use an adding machine with a cash drawer as something better than his own book of entry; it would get him some totals. But as a practical matter we can't conceive of any real competition between adding machines and cash registers.

Now, before closing, as I believe that states the substance of our case, I would like to call your Honor's attention to the fact that we shall attach to our brief a copy of the opinion of Judge Hickenlooper in the Ellis machine purchase. And just let me read to your Honor a few lines of what he said.

The Court: I don't think we are interested in that at this particular time. You can make it part of the record. We just want the statements now.

[fol. 100] Mr. Graydon: Very well. That is our case, if your Honor please. I haven't undertaken to try to state what the Government's case is. I think they can state it themselves. I have read it but I don't know that I understand it.

The Court: Is the Government ready to make a statement at this time? Of course, you understand the limit. We just want your position at this time.

OPENING STATEMENT FOR GOVERNMENT

Mr. Moyer: May it please the Court, the position of the Government on the application of The National Cash Register Company is this: The National Cash Register Company we believe intends to go into the manufacture of adding machines. It has the facilities to do so, and the purpose of the decree would be better served by their entering through their own manufacturing facilities rather than through the elimination of the largest distributor through independent dealers that there is in the market. It is true that 94.2% of the Allen Wales production in 1941 was adding machines and that they were one of the smaller companies in the field, but the larger companies represent companies similar to The National Cash Register Company, which distributes solely through their own owned and controlled outlets, with some exceptions; at least, Allen-Wales represents approximately 30% of the available adding machine supplies for independent office equipment, dealers and

business machine operators. The maintenance of competition at that level through independent dealers we believe is vital, and to eliminate that would substantially lessen competition in the industry.

We further take the position that Allen-Wales, in its manufacture of cash drawer machines and accounting machines, has merely begun the manufacture. They started in 1940, actually. The figure—I believe it was 257 accounting machines represents the first year in which they were offering that to any general extent. The same is true of the cash drawer machines.

[fol. 101] Now, irrespective of the definitions that The National Cash Register Company may adopt as a matter of salesmanship with respect to their cash registers, it seems clear to us that with respect to many types of business the cash drawer machine and the cash registers are in competition. The retail store or the service station or the beauty shop is going to buy either a cash register or a cash drawer machine, and whether they want the additional features or not becomes a matter of salesmanship. Since Allen-Wales is just entering into the two additional fields, and since Allen-Wales represents an essential source of supply for independent dealers in office equipment, we feel that the petition should be denied.

The Court: Will you try to limit and narrow the issues to just what you really are objecting to? I mean are there two types of machines that you claimed that The National Cash Register Company are at present in competition with Allen-Wales, just two types of machines?

Mr. Moyer: There are three.

The Court: What I would like you to do is to just specifically state what your objections go to.

Mr. Moyer: Present competition, as counsel for The National Cash Register Company has stated, involves a very small percentage of Allen-Wales production. Those are bookkeeping machines and cash drawer machines. Potentially they are competition on both of those. With respect to adding machines, which represented 94.2% of Allen-Wales' production in 1941, we feel that there is potential competition with the National, that National would go into this line and develop it itself, and that the public interests would be served by maintaining Allen-Wales as a source of supply for independent office equip-

ment dealers. That is, competition at the distribution level will be substantially reduced if National acquires Allen-Wales and markets the adding machines and the other [fol. 102] machines, if they market the first two machines at all, through their company-owned and controlled distribution outlets.

The Court: Do you have any figures, or will they be introduced by the Government here, concerning the profit or loss on these particular items?

Mr. Moyer: I believe Mr. Pickering, of Allen-Wales is here and that he was to furnish that information as a National witness.

The Court: All right.

FURTHER STATEMENT ON BEHALF OF PETITIONER

Mr. Graydon: Your Honor, before we proceed, I think I am given some glimmering of what his governmental theory is, and it seems to me it is an entire novelty in the history of jurisprudence under the Sherman and Clayton laws. To dispose of one thing, they say first if we don't get Allen-Wales that we will go into the manufacture of these machines anyway. If that is considered relevant, your Honor, we have witnesses here to show it would take five to ten years to develop that. But I will pass that; that is speculation as to the future.

Then they have introduced a new element. They say Allen-Wales represents 30% of the independent dealers, and then they refer to maintaining competition at what they call the dealer distribution level. If your Honor has in mind the provisions of the Clayton law—and this decree was entered two years after the Clayton law was passed—the Clayton Act deals with the acquisition of stock of one company by another where the effect of the acquisition will be to substantially lessen competition between the purchaser and the seller. And I submit to your Honor that this question about the effect on some little merchant is not in this case; it has got nothing to do with this decree or the Clayton law.

[fol. 103] RALPH C. ALLEN, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Examined by Mr. Moyer:

Q. What is your full name?

A. Ralph C. Allen.

Q. What is your present occupation?

A. President, Allen Calculators, Incorporated.

Q. What products do Allen Calculators, Incorporated, manufacture?

A. Adding machines, bookkeeping machines, calculators, cash registers.

Q. How long have you been in the business?

A. Eleven years. You mean this business?

Q. Yes. How does Allen Calculators distribute its products?

A. Almost entirely through dealers.

Q. How important is it to independent office equipment and business machine dealers to have available to them a line of adding machines?

A. Very important.

Q. Why?

A. Well, they sell machines regardless of larger companies who sell through agents. They sell for their own account and sell many other items in the office equipment field, typewriters, service machines, and so forth.

Q. Their business depends on the availability of a large number of items?

A. Quite true.

Q. One or two or three items may be the critical items as between profit and loss under an independent dealer.

Mr. Graydon: We object to that.

The Court: It is preliminary. There was some discussion by Mr. Pickering about that. All right.

A. (after last question was read): That is true.

Q. What items would those principally be?

A. Typewriters, adding machines and cash registers.

Q. By cash registers do you mean second-hand National and other cash registers of that type, or do you mean cash drawer machines?

A. Well, any device which has a box to hold money and [fol. 104] a recording mechanism is a cash register.

Q. And an independent dealer must have—

The Court: I wonder if it would not be better to show whether we are talking about a new or used business, because we have to take almost judicial notice of the fact that the typewriter companies have their own agencies and are not handled through independent dealers. I think that ought to be made clear at this point, whether we are talking about new business or used machines or what it is about.

A. Your Honor, I believe that you will find in the typewriter industry some of the companies, not only the four large ones, do sell through dealers. It is not controlled as in the cases of Burroughs and National Cash, with direct agents. In large cities, yes, but in some advantageous points even the large companies have established dealers.

The Court: Of course, we are talking about the general rule and not the exception. We want to keep that straight.

Q. What would be the effect on independent distributors in relation to the availability of cash drawer machines and adding machines if the National Cash Register Company acquired the Allen-Wales Adding Machine Corporation?

A. It would be disastrous if they were not satisfied on the offer of the National.

Q. You mean that they personally would suffer injury or there would not be other products available to them?

A. There might be, but not necessarily openings for everybody.

Q. When you say other products might be available to them would that be in substitution for presently established dealers?

A. Yes.

Q. You saw the demonstration of Petitioner's Exhibit 7?

A. Yes.

Q. Are you acquainted with the National Cash Register accounting machines?

A. Quite well.

Q. Does the National Cash Register produce a machine similar to this?

A. Yes.

[fol. 105] Q. Would you explain the function of this machine—that is Petitioner's Exhibit 7—and compare it with

a similar National Cash Register Company machine, explain their functions?

A. Well, an Ellis type is a simpler mechanism. It is comparable to this. You could build up duplicates. I believe they are offered freely.

Q. Is that National Class 3000 machine, stripped of the common features used for listing, the National comparative machine?

A. It is not the same as this. It has not the same keyboard arrangement. The same keyboard could be made up. I don't know what their sales allowance or price lists offer. It could be done.

Q. How many cash drawer machines were produced in 1941?

A. Approximately twelve or fourteen thousand.

Q. Does each sale of a cash drawer machine replace a cash register sale or displace a cash register sale? Strike that question out. A businessman wanting a receptacle for his funds, does he have a choice other than between a cash drawer machine and a cash register?

Mr. Graydon: I think that is a conclusion.

A. It is the customer's choice.

Q. If he buys one he doesn't buy the other?

Mr. Graydon: Just a minute, Mr. Moyer.

The Court: I think here for the record we will let the answer stand. Let's have the next question.

Q. If a sale is made of a cash drawer machine or of a cash register the customer is eliminated for the other?

A. That's right.

Q. Would the elimination of Allen-Wales' distributors limit the field for independent manufacturers to find outlets for their products?

A. Yes.

Q. Please explain why.

A. Well, the present set-up of the market, there are five independents, so-called, and Allen-Wales, Allen Calculators and Victor are the three larger organizations, Monroe and Barrett are the two smaller ones.

[fol. 106] Q. Independents?

A. Independents. With Allen-Wales removed it would affect a number of distributors who are now selling Allen-Wales.

Q. Do other independent manufacturers of business machines look to Allen-Wales distributors as outlets for their production?

A. Yes.

Q. The availability of independent office equipment and business machine dealers, does that eliminate the necessity of developing an entire sales organization when you go into the manufacture or development of a new project, expand your production?

A. Can you put that in fewer words?

Q. Strike the question, please. Could you start in business now, assuming you attempted to go into business at this time in the business machine field, manufacturing, could you start without independent dealer outlets?

A. Very doubtful.

Q. Why?

A. The large amount of capital it requires, and you would not be able to get distribution quickly.

Q. Approximately what would be the cost, in percentages, of going into the business at the present time as between production facilities and distribution facilities?

A. As I say, the distribution facilities would be by far the most expensive.

Cross-examination.

By Mr. Graydon:

Q. What do you mean by saying that distribution facilities would be more costly than going into the manufacture and production of a machine?

A. The time element.

Q. Do you take into consideration the cost of a plant and the acquisition of machinery and the employment of engineers?

A. Yes, I take that into consideration.

Q. And you say it would cost you more money to distribute than it would to build a plant and produce a machine?

A. That has been my experience.

[fol. 107] Q. Have you ever seen the plant of the National Cash Register Company?

A. Many times.

Q. Could you give us an estimate of what that cost?

A. Twenty-five million.

Q. You think it cost them more to distribute their product than to build a plant, build the machines, get into production on the line, you say it would cost more to distribute that product than to make it?

A. From my own experience.

Mr. Moyer: If your Honor please, the witness testified that starting from scratch, the development of production facilities and distribution facilities. Now, it may be that with independent distributors available the cost of distribution would be much less than with established distribution. I think the evidence shows that all right but the witness did not testify that generally distribution was more than manufacture.

The Court: You mean starting out from scratch at this point, is that right?

A. That is right.

Q. What do you mean by "independents" in the adding machine business.

A. Dealers.

Q. What?

A. The general rank and file of so-called typewriter dealers and adding machine dealers.

Q. You said there were five independents. That is what I want to know, what you mean by independent manufacturers.

A. There are two groups selling through their own organization, the four large companies, and five in the lower group.

Q. Take one in each group. Take Burroughs and the R. C. Allen. You call yourself an independent?

A. Yes.

Q. Isn't Burroughs an independent?

A. They do not sell to dealers.

Q. You are talking about the dealers. You are not talking about four independent companies, that the larger companies are independent, are you?

A. You state your question and I will answer it.

[fol. 108] Q. I am asking you what you mean when you say there are five independent manufacturers of adding machines.

A. There are, who, generally speaking, do not have among them any directly controlled sales agents but sell to consignors.

Q. What do you think—

Mr. Meyer: —I think the witness answered the question; it is not what the witness thought.

The Court: It is a little confusing. I think there may be something else than independent.

Mr. Meyers: May I suggest to the witness he means by independent manufacturers those who distribute through independent dealers? Is that right?

A. That is right.

Mr. Meyers: Is that your yardstick?

A. Yes, sir.

Q. That is what I wanted to get. You were president of the Allen-Wales Company?

A. Yes, sir.

Q. How did your connection with them terminate?

A. I was released from the service.

Q. You have some lawsuits, haven't you?

A. Not suits—suit.

Q. One suit. What is that about?

A. That is in regard to the amount of stock which I claim I have coming.

Q. Who is the defendant in that suit?

A. Harvey Gibson.

Q. Who is he?

A. Banker.

Q. What connection did he have with the Allen-Wales Company?

A. He organized the syndicate that purchased the business.

Q. How long has that suit been pending?

Mr. Moyer: If the Court pleases, I wonder if this isn't—

Mr. Graydon: —This reflects on the motive of this witness.

Mr. Moyer: I wonder if we haven't gone far enough with this collateral matter to indicate whatever counsel [fol. 109] is driving at?

Mr. Graydon: I am driving at the purpose and intent of this witness in coming here to oppose this sale.

The Court: The point about it is, of course, when a witness takes the stand he takes it for every purpose, the question of attacking his credibility, the purpose or motive.

Mr. Meyers: Except insofar as there may be a limit going into the collateral matter.

The Court: We haven't reached that limit yet.

By Mr. Graydon:

Q. Tell us about this litigation you got into after you were released, as you say, from the Allen Wales Company.

A. I don't know of any litigation.

Q. You just told us about a suit.

A. I said after I was released from Allen-Wales.

Q. Did you start the suit before you were released?

A. No.

Q. When were you released?

A. I was released September, '31.

Q. What year?

A. 1931.

Q. Then you got into a lawsuit?

A. I did not.

Q. Well, tell us about it now. Have you got something to hide about this?

A. What?

Q. Tell us about you and this man Gibson.

A. There is nothing to tell except I had a contract to buy some stock.

Q. Did you bring a suit against him?

A. That's right, 1940, I believe.

Q. Why did you wait that long?

A. Well, that is time enough.

Mr. Meyers: Your Honor, may I suggest the witness, since this is a matter of another litigation, may not wish to answer, and may incur prejudicing his rights in another litigation.

Mr. Graydon: He hasn't said he didn't want to answer.

[fol. 110] By Mr. Graydon:

Q. Will you tell the Court, Mr. Allen?

A. I don't believe I care to discuss this personal matter.

Q. It had something to do with your participation in Allen-Wales business, didn't it?

A. Nothing whatever, except the stock another man owns.

Q. Tell us why you are so interested in the fate of the distributors of the Allen-Wales Company.

A. I am not particularly interested in the distributors of the Allen-Wales Company.

Q. What position do you hold in the Allen Calculators?

A. The name of the firm is Allen Calculators.

Q. And your name is R. C. Allen?

A. R. C. Allen.

Q. You are president of the company?

A. Yes.

Q. And that is a competitor of Allen-Wales?

A. Very much so.

Q. And if Allen-Wales, by reason of purchase by National Cash, got a wider distribution and stronger backing, it would naturally furnish stronger competition to your company than in the hands of the Allen-Wales Company?

A. Yes—I don't know.

Q. That is your real motive, isn't it?

Mr. Meyers: May I suggest that that is a motive of the Government if the acquisition is made by National Cash Register Company. I think counsel for the National Cash Register Company has made the point for the Government.

Mr. Graydon: I am dealing with this witness in his attempt to intervene in this case.

Mr. Meyers: I say the acquisition of Allen-Wales will tend to drive competition out of the industry, and Mr. Allen represents one type of competition.

[fol. 111-112] By Mr. Graydon:

Q. You said you thought that the representatives, these distributors that have been selling Allen-Wales machines, would suffer if they were not satisfied with the offer of the National Cash Register Company.

A. I believe that could happen, yes.

Q. If they were satisfied, they would not suffer; is that true?

A. If they were satisfied.

Q. You heard the offer read, didn't you, the declaration of intention?

A. I did not follow it closely.

Q. If certain dealers couldn't give Allen-Wales machines that would be possibly entry for the sale of more of your products.

A. Under certain circumstances.

Q. Aren't you afraid, or isn't your company afraid of National Cash Register Company coming into the adding machine field?

A. I don't know as I am afraid.

Q. You are not glad to hear that they are coming in, are you?

A. I don't know that it excites me particularly.

Q. Well, didn't you have a petition filed here to try to stop it?

A. I think for the good of the independents the deal should be stopped.

Q. It is for the good of the independents you filed this?

A. No, I did not say that. I said I believe that the independents would be benefitted if the deal doesn't go through.

Q. You believe that you would be benefited too, don't you?

A. I don't admit that. I probably will.

Q. Did you file this petition for the benefit of independents?

A. No. That is for our company.

Q. That is for Allen Calculators, Incorporated?

A. Right.

Mr. Meyers: If the Court please, the petition speaks for itself.

Mr. Graydon: All right. I want to find out if this witness know what is in it.

[fol. 113] The Court: I haven't seen it.

Mr. Meyers: The Court has denied the petition. I don't think there is anything before the Court.

Mr. Graydon: I want to see what statements of fact this witness has made contrary to the statements of fact he has undertaken to make on the witness stand.

By Mr. Graydon:

Q. You swore to that, didn't you?

Mr. Moyer: If the Court please, if the petition is to be introduced—

Mr. Graydon: —He swore to this record.

Mr. Moyer: It is not in evidence.

Mr. Garver: He made an affidavit.

The Court: What is it?

Mr. Graydon: This is that attempt to intervene, if your Honor please. There are eleven pages of allegations that this witness has sworn to.

The Court: It will be better if you will say what it is.

Mr. Graydon: It is entitled in The United States of America vs. National Cash Register Company, Equity No. 6802. Please take notice that Allen Calculators, Incorporated—

The Court: —I know what you are talking about now.

The Graydon: Signed and verified by Ralph C. Allen.

By Mr. Graydon:

Q. I see you state in Paragraph 4 here: "Thus no reason is shown in the petition of the National Cash Register Company why the National Cash Register Company should not develop its own line of adding machines or similar machines if it wishes to develop that phase of accounting machine business." Is that your language?

Mr. Moyer: I don't think the source of the language, the source of the petition—

Mr. Graydon: I want to find out if somebody else drew it up and got him to sign it or whether he knows what is in this [fol. 114] petition.

The Court: All right. I think we have reached the point for adjournment. We will adjourn until ten o'clock in the morning.

Mr. Graydon: We have finished with the witness, if your Honor, please.

Mr. Moyer: I think I can finish in another five minutes, and we may be able to wind up.

Mr. Graydon: If you enter into anything new I might withdraw that.

The Court: Let's proceed.

ARGUMENT ON BEHALF OF GOVERNMENT

Mr. Moyer: May it please the Court, the Court is quite correct in its statement that this proceeding is governed by the terms of the decree. I think we should carefully analyze the decree, turn to the decree, to judge exactly what the proceeding is. Paragraph Second, Subdivision (p) of the decree prohibits the National Cash Register Company from acquiring either ownership or control, in the alternative, directly or indirectly by means of stock ownership or otherwise—a general prohibition against any device, any means, direct or indirect, of acquiring the whole or any essential part of the business, patents, or plant of any competitor engaged in the manufacture or sale of cash registers or other registering devices. Those terms seem to be as broad as possible to cover any means or any device of acquiring any phase, in whole or in part.

The Court: Excuse me just a minute. They are absolutely by injunction prohibited from doing that.

Mr. Moyer: Pardon!

The Court: They are absolutely by injunction prohibited from doing just what you say, but then it goes on—the second paragraph, or second part of the paragraph controls: "Provided, that in case any such acquisition is desired, a petition [fol. 115] may be presented to this Court, which reopens.

Mr. Moyer: I am referring to the first portion of the paragraph merely to lay the foundation for calling the Court's attention that this does not involve merely the scope of the Clayton Act or, for that matter, merely the scope of the Sherman Act or Section 5 or 6 of the Federal Trade Commission Act. This involves a general prohibition, with the exception I believe interpretable only in terms of the general prohibition. I am not claiming that the exception, in so far as its scope, that is, what facilities it covers, what type of competition it covers, is any narrower than the general rule, but I say the whole section is a broad decree, and exception from that broad general rule that applies all the way up and down the line, any part of the business. Certainly, the dealer, the method of distribution, even the good will is incorporated in a distribution set-up, and certainly the testimony we had yesterday, that starting from scratch in this business you would have to spend as much developing distribution as you would in developing production, indicates that that is an important part. It may not be the

whole, but the terms of the decree apply to any part. And it is general with respect to cash registers or other registering devices in interstate or foreign commerce. Then there is an exception, an escape provision. And under what terms does it operate? It operates first upon the filing of a petition—that has been done—in which reasons have been stated, and then we come to an important condition of the escape clause, "and if the Court upon investigation into all the circumstances of the case"—unlimited, as broad as the previous prohibition.

And I might interpolate here, your Honor, that I have not regarded this proceeding, and I don't believe proceedings under this decree are properly regarded as an adversary [fol. 116] proceeding between the Government and the National Cash Register Company. Rather, the Court is charged under this decree with determining the scope of the investigation and all the circumstances, and we of the Department of Justice are in effect acting as commissioners in presenting to this Court information and data upon which the Court can act. And I might say at this time that if the Court believes that we have been deficient in providing the Court a full picture of all the circumstances, if the investigation doesn't cover what the Court believes it is charged with doing upon its investigation, we will gladly undertake to supply any deficiencies with respect to presentation.

And, interpolating again, I believe that is important with respect to the statements of the distributors which I will refer to later and which I hope the Court will take an opportunity to read, because we consider those secured and furnished for the purpose of aiding the Court in its investigation and securing information for it from all possible sources.

Before concluding our comments on the terms of the decree I would like to point out one additional thing. Recently Judge Wyzanski, in the District Court of Massachusetts, had a question involving an antitrust proceeding. There was a question of intervention. He made this very illuminating statement:

"Judges must be willing to hear from more than the conventional parties in an adversary procedure, to receive expert suggestions from specialists and governmental agencies, and accept economic testimony ap-

propriate for laying down a broad rule in industrial government and to find decrees suitable to the character of the many dimensions of the problem revealed."

That was in connection with an antitrust proceeding similar to this, where the Court is called upon to consider by the decree all the circumstances, any part of the business.

[fol. 117] The Court: This is not an antitrust proceeding here. In the beginning it was unfair trade practice, I assume.

Mr. Moyer: Originally it was a case brought under Sections 1 and 2 of the Sherman Act.

The Court: I just have a faint recollection of it. But here you have eight or nine companies in the same business and four of them are large competitors, but that is not strictly in the case here today, as I see it. Originally, yes, it was definitely in the case, but this decree takes care of that.

Mr. Moyer: I know that is definitely a question and I will take that up.

The decree continues, that the business—still general and all-inclusive—or patents or plant so desired to be acquired will supplement the plant, patents, machines, or facilities of the defendant corporation and that the acquisition thereof is desired for that purpose and will not substantially lessen competition. Then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as may be right. That provision I think is all-inclusive; it covers any phase of competition, whether distribution reacts on manufacture or manufacture reacts on distribution, and you can build a monopoly or you can build a series of restraints in either by controlling one or the other. The decree covers it whether it is directly or indirectly. It covers it in this case, all phases of the business, directly, and under indirectly it covers any phase that leads to restraints or *monopolization* or unfair trade practices in connection with the acquisition of any part.

Now, what position do we take when we come to interpret a decree of this type? The complaint in the case that was filed is replete with references; I might say the opinions of both the District Court and the Circuit Court of Appeals in the criminal case that counsel referred to as having been [fol. 118] reversed are replete with reference to the fact that

control of the distribution, knocking out the distributors of a competing company, or potentially competing company, was one of the major phases by which the cash register monopoly was established. And, incidentally, the reversal, as I understand it—I did not have the opportunity that counsel did to participate personally in it—the reversal in the Circuit Court of Appeals was on the basis that the monopoly had been completed three years before the action was brought, and therefore, the statute of limitations had run. I don't think that decision on that point is good law today. At any event, there was no question about the fact that a monopoly had been established, had been established through the very practices or practices with the same effects as the company proposes today. Now, with that background and with this provision in the decree, what reference do we make to our statutes in determining the scope of operation of the decree? I believe, your Honor, the Government takes the position that this must be interpreted and applied with the sophistication that comes from just good sound common sense, and that is incorporated in our statutes. And the decree goes further than the statutes in that, it recognizes a general overall principle that doesn't contain the exception that the Sherman Act may contain, of whether it is reasonable or not, whether it is a reasonable interference with competition—merely substantially reduced competition.

I want to call your Honor's attention to the provisions of the Sherman Act, the Clayton Act and the Federal Trade Commission Act. Under Section 1 of the Sherman Act:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal;”

a general prohibition against any contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce. Under that Act, if the two corporations involved here today should enter into an agreement, [fol. 119] or enter into a trusteeship of their stock, or should take any joint action that would involve joint price-fixing of Allen-Wales products, a joint boycott of Allen-Wales dealers, the vesting in National Cash Register the power to determine who might purchase Allen-Wales prod-

nets—I could go on indefinitely along that line—such agreement, such combination, or such understanding would inevitably and unquestionably be a violation of Section 1 of the Sherman Act.

The Court: May I suggest something here? I fail to see anywhere in the record so far any suggestion of restraint of trade. The whole theory of this case, as I see it, is just the reverse of restraint of trade. Mr. Pickering testified yesterday that their capital was \$1,650,000, subject to certain liabilities, that it would require the same amount to go into the cash register business, such as National.

Mr. Moyer: They are in the business.

The Court: I know, but what he called a cash register would take ten or fifteen more years; that they have a limited method of doing business now; that they have two offices of their own and the rest is through dealership; they are unable to reach all parts of the United States; that there are plenty of sections of the United States that haven't even the benefit of their adding machines. And I wish, too, you would keep in mind that whatever is said and done is always controlled by this word "substantially". I just want to give you some thoughts of what is going through my mind at the moment. I remember that chart was 69,000 units of National Cash against 357 of Allen-Wales, which covers about 3% of the units here. I think the Government has stipulated that the adding machine proper is not made by National Cash at all; is that right?

Mr. Moyer: That is correct, except for those sales of 359, was it?

The Court: 357 or 359.

Mr. Moyer: To the Federal Reserve Banks.

[fol. 120] The Court: I only want to suggest to counsel here that the Court, of course, is controlled by the Supreme Court, and that 94% of the business relates to the adding machine alone, and, as I follow that International Shoe case, there was a question of 5% which they held did not substantially lessen the competition. So if counsel keep that in mind, that is what we are interested in.

Mr. Moyer: I might say with respect to the International Shoe case there was a very strong dissenting opinion and the majority opinion, because of the statements of distribution that were in competition and because of potential competition between the two companies, eliminated those ques-

tions from the case on the basis that the company that was being acquired was either insolvent or in the process of bankruptcy. That was similar to the acquisition of the Remington Typewriter Company in this case, where there were at least representations to the Court that the Remington Company was going out of business anyway. We have that situation. There may be some question about potential competition and the seriousness of the continued availability of the product in competitive distribution channels; but in the International Shoe case the questions we raise here were considered, as I regard the case, by the majority and eliminated because they considered the company would be out of business anyway. The dissenting opinion said that shouldn't make any difference because even a bankrupt company can be reorganized and in time will be back in operation. It seems to me that is what that case turned on.

The Court: Well, I go along on those facts too, but the point is that they did hold that a bare 5% cannot be construed as substantially limiting competition.

Mr. Moyer: The real crux, eliminating the facts the Court eliminates—I am not eliminating them; I will refer to them later—eliminates the fact that Allen-Wales has just gotten started, that the 5% represents the first year in which they were really getting under way in these competitive machines with National, that the war has dislocated everything and distorted the picture with respect to production. If we disregard that, we still have the major question, and [fol. 121] a question of real substance, where we have at least 65 to 70% of the available business machines distributed through company-owned systems as against the four other minor companies who have approximately 30% of the business distributing through independent dealers, and now the National, the biggest, or at least equal to the biggest of the four majors, wants to acquire the largest independent. It simply means that the public, independent dealers, a whole system of competitive distribution—and that is important to National it is a major part of their business—disappears. The only opportunity the public has when it is faced with that type of distribution system is to deal according to the regulations established on an administered basis at the concentrated control of the home office. As contrasted with that we have small dealers operating their own businesses. They are able to cut prices,

they are able to meet competition by trade-in allowances, furnishing additional services, they take old machines and remake them. National destroys them; they want them off the market. The continued existence of manufacturers who can supply these independent dealers—there probably aren't more than 4000 in the United States, all over—they depend on a variety of lines, I think the testimony clearly shows.

The Court: I tell you, I am sorry I can't go along with you. I have a natural sympathy, you understand, for everything you are saying, but again I have to tell you that I am controlled by this decree, as I see it.

Mr. Moyer: Your Honor, the putting out of business of a group of independent dealers does not supplement the business, any part of the business of National—and your decree speaks of "any part". When this decree was written I am sure it wasn't contemplated by the Court with this language—and I am speaking only of the language; I don't know what was on the Court's mind—that it did not intend a continuance of National's acquisition of strong independents and they did that before 1912 and are continuing to do it now on the theory that this is a limited [fol. 122] prohibition. It is not limited.

The Court: Just a thought again. Suppose the Government took the same position when you had fifty or a hundred small automobile manufacturers and today we have got three big groups, suppose the Government took the same position then, hasn't the public gotten the benefit of what was done there? Hasn't the public gotten the benefit so far when you see machines like these? I am only posing that as a suggestion in behalf of the general public as opposed to a group of small dealers. Of course, everybody gets hurt somewhere along the line, I understand that.

Mr. Moyer: Don't mistake our position as being one merely of sympathy with a man who loses in the competitive struggle.

The Court: All right.

Mr. Moyer: A business should rise and fall on the basis of its own ingenuity and technique and there should be competing technology. The main business manufacturer should always be faced with the competition of these cheaper machines. Why shouldn't there be a market for the beauty shop, for the small business man? The whole

philosophy of the concentration that is represented by the four major's here, three majors in the automobile industry, two, three or four in the chemical industry, is the philosophy expressed by Mr. Allyn when he said, "Why, those are just little people." The availability of competing products, of maintaining and keeping these companies on their toes, the survival of that competition, is a matter that the public deserves. National Cash Register Company has developed, it has grown, it has even been engendered by orders of this Court. They at least owe it to the public to use their technology, and I think it is ridiculous for a company with the available supplies in research and technique of the National Cash Register Company to come before this Court and say "We can't develop a new machine. We have got to save a year by putting the largest of the independents out of business," cutting off the public benefits that come from maintaining independent office equipment people and business machines men in operation. Sure, [fol. 123] they are the only ones that don't operate on administered prices, they are the only ones that can compete with the little fellow, can get a deal. The National Cash Register Company owes it to the public to develop its own machine. They have a distributive system. Let them compete. Let them compete in technology. They are acquiring the technology of a cheap machine. That is what this is. When I say use sophistication with common sense does anyone expect National to continue to produce Allen-Wales machines that will interfere with the sale of National machines? No. Price reductions haven't followed previous acquisitions. Mr. Allyn testified to that. Prices have dropped, the whole price level has dropped in that period. But, irrespective of whether prices were increased or decreased because of acquisition, the Sherman Act, the Clayton Act and the antitrust laws and our whole system of free competition that I think this decree was meant to incorporate in the future conduct of this company dictates that there shall not be four majors with administered and concentrated management spread throughout the country acquiring fifteen or thirty per cent of independent competition that is left. If we proceed on that line—And, referring to the 5%, there was some testimony that several companies manufacture this particular machine (indicating); some of them buy adding machines, apparently, some of them buy the drawers, various combinations. Some equipment

dealers may put them together. That isn't the major part of any one of their businesses. Mr. R. C. Allen testified they are 12,000 units in one year; Mr. Allyn of National testified 13,500. R. C. Allen testified, I believe, during that period they had approximately 2,000. Allen-Wales, who had just gotten started, had several hundred and they went into the business because their dealers insisted on it. The letter of June 5th to the dealers said "You have been demanding that we go into this business"—because the dealers wanted it to supplement their line.

[fol. 124] The Court: Just another thought. They are competing right now against Burroughs, aren't they, and they are competing against Remington Rand.

Mr. Moyer: That is right.

The Court: How is this picture going to be changed if National goes in and furnishes stronger competition to the Burroughs and stronger competition to the Remington Rand? Wouldn't the independent man be better off than he is now?

Mr. Moyer: He won't be able to get machines.

The Court: Why?

Mr. Moyer: The source of supply is 33% less.

The Court: Why can't R. C. Allen's company then grow and furnish that part?

Mr. Moyer: Will they?

The Court: I don't know.

Mr. Moyer: We can't risk that. That hasn't been the history. That isn't the history of these acquisitions. The only way R. C. Allen can remain in business is if there are independent equipment dealers available, and I take it that was Mr. R. C. Allen's interest in coming here. He did not say that he would take over the business of the Allen-Wales; he said what he needed for the continuance of his business and the expansion of his business were independent outlets, outlets through which he could distribute. And you eliminate all these Allen-Wales dealers. And, your Honor will, I believe, and I urge you must strongly to review and read the statements made in reply to the Department's questionnaires. And I might say these are stipulated.

The Court: I will read every one of them.

Mr. Moyer: I would like to call your Honor's attention to this one. In answer to the question: "Are Allen-Wales products or substitutes for such products essential to a

[fol. 125] business such as you are conducting? Why?" They say:

"Yes. Our business is strictly selling and servicing business machines, such as those manufactured by The Allen Wales Adding Machine Corporation. Businesses such as ours are dependent upon manufacturers such as The Allen Wales Adding Machine Corporation in order to have products to sell and be a competitive factor in this business with other major lines. Our selling organization depends upon this type of equipment to sell, whereas our service organization depends upon what the selling department sell, so these products are definitely essential to our business."

The Court: Mr. Moyer, there are a number of those that take exactly the opposite view, aren't there?

Mr. Moyer: There are, I believe, two or three that do. All that we received are here. One that has a different reply also told us that he has entered into a contract with National. Here is one: In reply to the question, "The probable effects upon your competitive position with respect to other distributors of business machines or office equipment, if you could no longer handle the products of the Allen-Wales Adding Machine Company?" they said:

"If we can no longer handle the products of the Allen-Wales Adding Machine Corp., it will put us at a decided disadvantage in our competitive position with distributors of other office machines. This is emphatically true in our position as competitors of Burroughs Adding Machine Co., Underwood Elliott Fisher Co., and Remington Rand, Inc. With the Allen-Wales line, we have a machine that compares with the best any of these companies can offer. Without it there is no line we can secure that will compare favorably with either of the mentioned companies."

And when your Honor says, "Why can't they secure supplies from some other independent manufacturer?", recognizing the limitations just statistically, on statistics produced by National, the availability of independent production is reduced by at least one-third. Now that reduction to one-third in many instances—and I believe Mr. R. C. Allen testified to that—in many instances if an Allen-

Wales dealer is to get supplies from his company or from some other independent it simply means replacing some [fol. 126] dealer they have now. National has given us a description of the delay of one year that would occur if they use their own technology to develop an adding machine, and by all means we would like to see them go into the adding machine business on their own development. Unless our technology is bankrupt, if a company like the National can't go into business on its own know-how we are technologically bankrupt. And they can do it. Mr. Allyn testified it would just take a year, that is Mr. Allyn of National.

Mr. Graydon: No.

Mr. Moyer: Even if it were twenty-five years, it takes years to develop an independent distribution system. Every one of these dealers will have to make a readjustment. It means a readjustment all the way down the line on the competitive situation.

Now, with respect to the implications of that, this isn't any novel theory. There is nothing at all novel about it. The Supreme Court has emphasized it time and again, and it is essential that we do it if we are going to avoid a complete concentration in the control of one, two or three companies in a field without the discipline that comes to them without the existence of independent manufacturers and independent distributors.

The Court: If this were an original action that was unlimited it would be different, but you want again to come back to the fact that we have a decree that was entered some thirty years ago, and that is the controlling factor.

Mr. Moyer: No question about that, your Honor. The decree is controlling and the scope of the paragraph, that the Court is now called upon to interpret to my mind is without question sufficient to cover the implications and the consequences not only with respect to manufacturing facilities but with respect to distribution facilities. It says "any part of the business"—"the whole or any part." A reading of the other provisions of the decree indicates that activities with respect to distribution and the elimination of [fol. 127] independent distributors was definitely a part of the decree. And, as I say, I think under this provision of the decree we can look to general effects, we can look to what the consequences will be rather than applying a per-

centage term under the Clayton Act, which in the International Shoe case was 5% without future or potential competition. We can apply, and I think we are required to apply, the general provisions of the Sherman Act. The Sherman Act is the act under which the case was brought and under that if there were an agreement on price fixing, if there was joint action between these companies as to cutting off dealers or what dealers should buy or who should take a particular dealer; that would be, *per se*, a violation of the anti-trust laws. That is clear from the Socony-Vacuum case. Now because they come before this Court with this decree, with a particular type of device, to wit, acquisition, the Court certainly isn't called upon to close its eyes to the effects. The fact that they choose to gain control directly or indirectly by means of a stock acquisition is immaterial under this decree. The decree is general. It incorporates the antitrust laws, not only the antitrust laws but their spirit and provisions for free competition in industry.

I have mentioned the Socony-Vacuum case. I take it the Court is familiar with that. That is a general price-fixing case. Of course, the Ethyl Gasoline case involved dealers and distribution, maintenance of prices and boycott at that level. I call the Court's particular attention to *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U. S. 457. In this case the Court was interpreting the Federal Trade Commission Act and it made the observation: "Determination of the correctness of the decision below requires consideration of the Sherman, Clayton and Federal Trade Commission Acts." It goes on to say, in discussing the case involving disciplining dealers, eliminating competition among other things, among dealers:

"As a result of their efforts, approximately 12,000 retailers throughout the country have signed agreements 'to cooperate' with the Guild's boycott program, but more than half of these signed the agreements only because constrained by threats that Guild members would not sell to retailers who failed to yield to their demands—threats that have been carried out by the Guild practice of placing on red cards the names of non-cooperators * * *."

That is the way it operates; The Court observed:

"If the purpose and practice of the combination of garment manufacturers and their affiliates runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition."

And one of the provisions was:

"garment manufacturers shall sell to retailers only upon the condition and understanding that the retailers shall not use or deal in such copied designs."

The Court went on to say:

"Not only does the plan in the respects above discussed thus conflict with the principles of the Clayton Act; the findings of the Commission bring petitioners' combination in its entirety well within the inhibition of the policies declared by the Sherman Act itself. Section 1 of that Act makes illegal every contract, combination or conspiracy in restraint of trade or commerce among the several states; Par. 2 makes illegal every combination or conspiracy which monopolizes or attempts to monopolize any part of that trade or commerce. Under the Sherman Act 'competition not combination, should be the law of trade.' *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129. And among the many respects in which the Build's plan runs contrary to the policy of the Sherman Act are these: it narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy (*Montague & Co. v. Lowry*, 193 U. S. 38, 45; *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 48-49); subjects all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott (*Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U. S. 600, 609-611); takes away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs (*United States v. American Linseed Oil Co.*, 262 U. S. 371, 389); and has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs."

[fol. 129] The Court: I can't find any fault with that either, but that isn't here.

Mr. Moyer: It is here, your Honor, if this decree means what it says, any substantial competition.

The Court: Just a minute, please. We will have to go back to that again. I agree with you that you are quoting word for word what is in the decree and there is an injunction against doing any of those things. But it goes on to provide further in the event they want to go contrary to that provision then they come into Court, after giving the Attorney General sixty days notice, and so on. So that is why we are here, you see. They want to avoid that injunction to the extent prayed for in the petition. That is the issue here.

Mr. Moyer: And, your Honor, I say, passing the other questions for the moment, we will have the elimination of substantial competition, not only substantial competition but an invaluable and important segment of our competition when we shift from an independent manufacturer selling to dealers to a completely integrated operation by the National Cash Register Company. We are eliminating—there is no question Allen-Wales furnishes 33% of the source of supply for independent distributors. The continuance and expansion of all the independents depends on the continued availability of machines and supplies from independent manufacturers. We have the two working together. We aren't for a moment questioning National Cash Register's propriety—as I say, we urge it—of going into the adding machine business, but we don't think they should just go into the business by at the outset eliminating on the basis of their entire integrated operations 30% of competition in the business machine field. And to each of these dealers and to each of these manufacturers it is important that they should be able to get ten, fifteen, twenty or a hundred machines a year from a number of manufacturers. He has to carry a large number of items. There is substantial competition, your [fol. 130] Honor, and when I refer to the scope of the decree I think we would be blind if we said all we have involved here is manufacturing, and because an accumulator has to be fastened to the Allen Wales machine, or because this machine can be taken off of this, or because there is some minor difference in machines—that is a matter of salesmanship, that is where they compete, and

on price—we would be blind if those considerations were the controlling considerations. The basic substantial feature of the competition that will be affected—

The Court: You agree to this, that the real reason that the Government is here is on the theory that if this purchase were permitted to go through that the ultimate effect would be substantially lessening completion.

Mr. Moyer: That is exactly our position, and we don't think the case can be determined by lining up percentages under the Clayton Act, although the Supreme Court has gone pretty far in some cases just on a percentage basis.

Mr. Graydon: Mr. Moyer, before you finish—

The Court: —I was just going to ask a question. Do you want to supplement this argument with a brief, in view of what has gone on here now, the suggestions that have been offered? I say, in view of the suggestions here, that is, the Government's position, that if this purchase were permitted to be consummated it would substantially lessen competition and violate the anti-trust law and the Clayton Act.

Mr. Moyer: Violate the decree. I mean I even don't like to use the language "in violation" here. We believe that the Court should be fully and completely informed, and we are attempting to do it to the best of our available facilities and knowledge. So if the Court will—

The Court: I don't see what else you could furnish. I think the statistics right down to the minute have been furnished, and I don't see what else the Government could do to add to the case.

[fol. 131] Mr. Moyer: We had the alternative of calling a hundred or a hundred and fifty independent distributors. We couldn't do that under the circumstances.

The Court: Suppose you did that and the other side called ten thousand to prove they had been benefited. We would be back to where we started.

Mr. Moyer: I hope the Court will read those carefully.

The Court: I will do that. Suppose we recess for a few minutes before we go ahead. You supplement your argument here with a complete brief, if that is agreeable; if it isn't, say so.

Mr. Graydon: I want to submit the case now.

Mr. Moyer: I haven't completed my case.

Mr. Graydon: I mean at the end of your argument. Do you want to file a brier or do you want to submit the case.

Mr. Moyer: If the Court desires a final brief I certainly will. My personal preference would be to file a brief. I don't think it has to be a very extensive brief, but I would be guided by the Court's suggestion.

The Court: Suppose we recess at this point for about ten minutes.

Thereupon a short recess was taken; after which the hearing proceeded as follows:

Mr. Seasongood: Your Honor, could we have this entry? I have given them copies and now it has been stricken out, "on the ground that the relief requested by the petition of the National Cash Register Company in the above cause affects the decree heretofore entered herein and the only parties involved in such controversy are the Government of the United States and said National Cash Register Company"—that is stricken out as your Honor directed and it is rewritten with those words out and copies furnished to counsel (handing entry to the Court).

The Court: You may finish them, Mr. Moyer.

Mr. Moyer: I would like also to call the Court's attention to *Standard Fashion Company v. McGrane-Houston Co.*, 258 U. S. 346. In that case the Court, recognizing the potentialities, that is, the potential dangers inherent in the [fol. 132] elimination of independent distribution outlets and the continuous facing of control in larger cities, held that where one company controlled approximately two-fifths of the patterns distributed by dealers, controlled by dealers, that a contract which prohibited the sale of patterns of others would be invalid under the Clayton Act. The Court said:

"The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community."

That is, through the dealers.

"Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations; so that the plaintiff, or some other ag-

gressive concern, instead of controlling two-fifths will shortly have almost, if not quite, all the pattern business."

The Court made reference that the public interest had been served by the survival of one hundred and fifty automobile companies.

Under the governing legislation, or under a decree of this type, it seems to me that again is foreclosed by the spirit and the basic franchise contained in our antitrust laws. The ultimate effects of a merger or consolidation, where you have one hundred and fifty people in the field, are distinguished from four majors, four minors, and we are determining the fate of one, seems to me to be an entirely different question. We are down to the question where we have the four majors and the three minors and the minors having only 30%—we are down to the question, is there any terminal point?

When we reach the question of where is the terminal point I think we have to refer to the basic spirit of our antitrust laws, which say that competition and not combination shall be the rule. Certainly, for example, the acquisition by General Motors of Willys-Overland would eliminate substantial competition where you have the lowest priced car in the field. It is significant that the major automobile companies, it is a significant factor that the [fol. 133] major automobile companies have not produced—

The Court: What I wanted to get over to you was simply this, that sometimes, no matter how earnestly the Government tries and no matter how high their motives are, you cannot control economy and invention, and that the public is entitled to the best that they can get for the least money. It may be that somebody is going to get hurt along the way while that is going on.

Mr. Moyer: But the way we secure that, the best for the least money, is only through competition.

The Court: That is what I said again. Now we come right down to—you say that is your position here, that the consummation of this deal would substantially lessen competition, and that is what we ought to be talking about. You see, every one of those authorities that you cite is the law, but they all rest on situations peculiar to that case.

Mr. Moyer: Every situation under the antitrust laws always has, every case has ten, twelve, fourteen or fifteen elements in it. There are no two cases that are on par. The basic factor is that our whole economy is based, we are fighting a war to provide the survival of our free enterprise system and the government's point on substantial competition is not only with respect to the potential competition which, as I have indicated, the Supreme Court has taken cognizance of, but it is with an essential facility of the business, the distribution system, which I have also pointed out has been recognized as one of the elements. That may be a minor factor in some case; here it is a major factor. I think in sophisticated common sense it is obvious and the policing that comes to an industry through independent manufacturers and the outlets they must use if they are going to continue in business and expand, the independent dealers, it is clear, that that is threatened in this case.

Of course, National can go in the adding machine business, but it is the indication of monopoly thinking they feel they have to go into it. Suppose it takes five years for them to go into it, they will be there. It takes years [fol. 134] to develop a business. That is why we should preserve the few independent competitors who are developing their lines and preserve the outlets through which the lower-priced disciplinary competition reaches the public. We can speculate forever as to whether steel prices would be higher or lower if there wasn't concentration in the steel industry. In many other industries it is spread on the record of antitrust proceedings, there is no question about it, but the basic thing is, and I reiterate the test that we are called upon to apply, is, does this promote or does it substantially interfere with competition? The Court basically must weigh the convenience of National going into the adding machine business against the total disappearance of 30% of the independent competition. Certainly, the adjustments on one side, the time of readjustment, if readjustments can be made, are equal. National has presented its case. We can't compete with National in salesmanship. They have made a beautiful presentation in terms of charts and exhibits.

The Court: I think your position is very clear. There is no question on that score. It is not a question of sales-

manship, it is a question of fact. Do you have any other points to make here? I am sorry to have to get some thoughts over has shortened your time.

Mr. Moyer: If the Court would permit me just to check my notes for a moment.

The Court: Yes.

Mr. Moyer: There is just one point I wish the Court would bear in mind I think we are right about, and that is the point in this industry where we have to draw the line about acquisition if we are going to be able to maintain any independent competition, even though it is only 5% here and even though it may not involve all the dealers.

The Court: Isn't that a question for Congress to determine?

Mr. Moyer: Not at all, but the Court, under this decree, has to determine that. You have to determine whether it is going to substantially reduce competition. If there were one hundred and fifty companies, all of equal size in the field, a merger of two of them might not violate the anti-trust laws, it would be a question under the decree. Of [fol. 135] course, the Court in those circumstances would probably—if there were twenty-five companies the question would be closer, but where you get down to the situation we have here, if we permit this acquisition we would have to say this is the last acquisition because there won't be any independents left. It is 5%, 10%, 15% of independent production when independent production is down to 30%. All right. The court has full legislative authority and full authority under the decree and the duty to pass on this question.

The Court: We just have a right to interpret it and enforce it.

Mr. Moyer: I think it is covered by what we have before us. It is not a further matter for the legislature.

There are a few points I would like to touch on with respect to the case of the National Cash Register Company. Frankly, I don't think the National Cash Register Company has carried the burden of proof over the entire field of the industry involved, that is, of the business involved. They may have mechanically on the 5%, that is, on the manufacturing of 5%. They have not developed the potentialities of manufacturing for any period of years, which is an im-

portant consideration. Nor have they met the burden of showing that there will not be a substantial lessening of competition in phases of the business—and the decree refers to business when it says substantially lessening competition. It does not refer back to manufacturing. It refers to all the elements considered. They have not carried their burden there. They must convince the Court. If the matter is equally balanced it is up to them to convince the Court. They have not given us any assurance of public benefit other than the convenience of getting them into the adding machine business, and against that we weigh all speculative factors of when war contracts and war production will be terminated. Allen-Wales may be able to get back into production two years before National Cash Register Company. We don't know how soon war production and contract production is going to terminate. Certainly, [fol. 136] the statement by the president of the National Cash Register Company does not come from the insistence of the independent dealer who serves the small man.

The Court: I think that has all been covered.

Mr. Moyer: One further matter. If the Court should ultimately hold against the contention and position of the Government I think without question the decree should require the supplying of Allen-Wales parts to all customers. The testimony showed that National does not sell parts to independents. If the independents are to carry on their business of servicing machines, parts must continue to be available to them. There is a question of whether they should be permitted to destroy second-hand Allen-Wales machines.

The Court: Suppose you make that point in your brief.

[fol. 137]. Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 138] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. 6802 (C. C.)

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE NATIONAL CASH REGISTER COMPANY, et al., Defendants

THE UNITED STATES OF AMERICA,
Southern District of Ohio,
Western Division, ss:

I, Harry F. Rabe, Clerk of the District Court of the United States within and for the District and Division aforesaid, do hereby certify that the foregoing pages contain a true, correct and complete transcript of the Record on Appeal in the above entitled cause, in accordance with the praecipes of the parties filed herein, excepting Request No. 11 of Appellant's praecipe, entitled "Proposed entry containing ground of refusal of leave to intervene", which said proposed entry is not on file or of record in my office.

I further certify that the foregoing pages also contain a true and correct copy of the Statements of Appellant and the opposing Statement and Motion of the Appellee, filed under authority of Rule 12 of the Supreme Court of the United States.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 30th day of December, 1943.

Harry F. Rabe, Clerk U. S. District Court, Southern District of Ohio. (Seal.)

[fol. 139] SUPREME COURT OF THE UNITED STATES

STATEMENT BY APPELLANT OF POINTS AND DESIGNATION OF PARTS OF RECORD—Filed January 10, 1944

Statement of the Points On Which Appellant Intends to Rely

I. Appellant was entitled to intervention of right under Rule 24(a) (1), (2) or (3).

II. If appellant was not entitled to intervention of right under 24(a), it should have been permitted to intervene under 24(b) (1) or (2). An appeal lies where, as here, there was an unreasonable refusal of permission to intervene..

III. The suggestion, now made in opposition, that the motion to intervene was not timely is not supported by the record, and, moreover, is not available to National.

IV. The case is not moot.

Designation of Parts of the Record Considered Unnecessary To the Clerk:

In printing the record, kindly omit from the typewritten transcript:

(a) Appearances on cover of transcript of record (as these appear on p. 42).

[fol. 140] (b) Pp. 92-102, both inclusive (comprising opening statement on behalf of National and on behalf of the Government and further statement on behalf of National).

(c) Pp. 103-114 (testimony on direct of Ralph C. Allen called as a witness on behalf of the Government, 104-106, cross examination by National, 106-114).

P. 112 is a duplication of p. 111.

(d) Pp. 114-136, excepting paragraph beginning bot. p. 115, "and I might interpolate here, your Honor" and ending on p. 116 "any deficiencies with respect to presentation" (argument of Mr. Moyer on behalf of the Government).

(e) P. 148 (entry of November 16, 1943, overruling motion for leave to intervene, as this is a duplication of the same entry appearing on p. 22 of the transcript).

Murray Seasongood, Counsel for Appellant, Allen Calculators, Inc.

Service of copy of the above statement of points and designation of parts of record considered unnecessary is acknowledged this 8th day of January, 1944.

Joseph S. Graydon, Graydon, Head & Ritchey, Counsel for Appellee, The National Cash Register Company. Calvin Crawford, United States Attorney, Southern District of Ohio, Western Division, for the United States.

[fol. 140a] [File endorsement omitted.]

[fol. 141]. SUPREME COURT OF THE UNITED STATES

DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE PRINTED
—Filed January 17, 1944

To the Clerk:

In printing the record in this cause, please include the entire typewritten transcript other than the appearances on the cover thereof; that is to say, specifically include the parts of said typewritten transcript which appellant, Allen Calculators, Incorporated, designated to be omitted, to wit:

- (a) Pages 92-102.
- (b) Pages 103-114.
- (c) Pages 114-136.
- (d) Page 148.

Garrard Winston, Joseph S. Graydon, Counsel for Appellee, The National Cash Register Company.

Service of copy of the above Designation is acknowledged this 13th day of January 1944.

Murray Seasongood, Counsel for Allen Calculators, Incorporated. Calvin Crawford, United States Attorney, Southern District of Ohio, Western Division.

[fol. 141a] [File endorsement omitted.]

[fol. 142] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION
OF JURISDICTION—Filed February 7, 1944

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing on the merits, and the case is transferred to the summary docket.

The Chief Justice took no part in the consideration or decision of this question.

Endorsed on Cover: File No. 48,085 Southern Ohio, D. C.
U. S., Term No. 592. Allen Calculators, Inc., Appellant, vs.
The National Cash Register Company and The United
States of America. Filed January 10, 1944. Term No.
592 O. T. 1943.

End